MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

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COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021
Chief Judge Pro Tem	
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Judges	
DAVID SAWYER	2017
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
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JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
KURTIS T. WILDER	2017
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DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
PAT M. DONOFRIO	2017[1]
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STEPHEN L. BORRELLO	2019
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JANE M. BECKERING	2019
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Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To October 1, 2015.

SUPREME COURT

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Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
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MARY BETH KELLY	2019[1]
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BRIDGET M. McCORMACK	2021
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Crier: DAVID G. PALAZZOLO

[1] To October 1, 2015.

[2] From October 5, 2015.

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COURT OF APPEALS CASES

CASTRO v GOULET

Docket No. 316639. Submitted July 16, 2014, at Lansing. Decided August 20, 2015, at 9:00 a.m. Leave to appeal sought.

Ruben and Christy Castro filed a medical malpractice action in the Washtenaw Circuit Court against defendants for complications Ruben Castro suffered after defendants performed arthroscopic surgery on him. Plaintiffs failed to file an affidavit of merit with their complaint; instead, plaintiffs filed a motion under MCL 600.2912d(2) to extend the time for filing the affidavit of merit. Although the motion to extend time was filed before the statutory period of limitations expired, the trial court, David Scott Swartz, J., did not grant the motion until after the period of limitations would have expired without the benefit of the 28-day extension. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(7), ruling that simply filing the motion for an extension of time did not toll the period of limitations. Because plaintiffs did not file an affidavit of merit before expiration of the period of limitations, plaintiffs did not successfully commence the action within the period prescribed by the applicable statute of limitations. Plaintiffs appealed.

The Court of Appeals *held*:

The trial court erred by granting defendants' motion for summary disposition because plaintiffs' motion to extend time for filing an affidavit of merit was filed before expiration of the limitations period, the motion was eventually granted, and plaintiffs filed the affidavit of merit within 28 days of their timely filed complaint. Because the trial court ultimately granted plaintiffs' motion to extend time and because plaintiffs filed the motion to extend time before the period of limitations expired, the period of limitations was effectively tolled on the date plaintiffs filed their motion to extend time. The fact that the motion to extend time for filing an affidavit of merit was not granted until after the period of limitations would have expired in the absence of an extension was of no consequence to plaintiffs' action. The fact that the motion was granted was the dispositive event in this case. A party must proceed as if its

motion to extend time will be granted, and it must file the affidavit of merit within the 28-day extension permitted by MCL 600.2912d(2). Plaintiffs' action was timely commenced because (1) plaintiffs filed the motion to extend time before the period of limitations had expired, (2) the motion was ultimately granted, and (3) plaintiffs filed the required affidavit within 28 days of filing their complaint. The trial court should not have granted defendants' motion for summary disposition under these circumstances.

Reversed and remanded.

WILDER, J., dissenting, concluded that the trial court properly granted defendants' motion for summary disposition because plaintiffs did not timely commence the medical malpractice action against defendants. Plaintiffs failed to file the required affidavit of merit before expiration of the statutory limitations period, and therefore, their claim was barred. The majority's ruling means that a motion to extend time, regardless of the date on which it is granted, operates to retroactively toll the period of limitations from the date on which the motion was filed. There is no support for the majority's holding. In this case, the trial court did not grant plaintiffs' motion to extend time until after the period of limitations expired, and therefore, plaintiffs did not have the benefit of an additional 28 days in which to file the affidavit of merit. Because the affidavit of merit was not filed within the statutory limitations period, plaintiffs' cause of action should have been barred for failure to comply with the applicable statute of limitations.

MEDICAL MALPRACTICE — STATUTE OF LIMITATIONS — AFFIDAVIT OF MERIT — MOTION TO EXTEND TIME.

A motion to extend time for filing an affidavit of merit effectively tolls the statutory period of limitations if the motion is filed before the period of limitations has expired; an affidavit of merit is considered timely filed if it is filed pursuant to a timely filed motion to extend time for filing the affidavit within 28 days of a timely filed complaint, regardless whether the motion for an extension of time was granted before the period of limitations would have expired absent any extension (MCL 600.2912d(2)).

James D. Wines for plaintiffs.

Kerr, Russell and Weber, PLC (by *Patrick McLain* and *Joanne Geha Swanson*), for defendants.

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

RONAYNE KRAUSE, P.J. Plaintiffs appeal as of right an order granting defendants' motion for summary disposition of their medical malpractice claim under MCR 2.116(C)(7) for the failure to file an affidavit of merit (AOM) with their complaint within the two-year period of limitations. Instead of an AOM, plaintiffs filed with their complaint a motion to extend the time for filing an AOM as provided for by MCL 600.2912d(2). The trial court granted that motion; however, the court subsequently granted summary disposition on the grounds that the action itself was untimely. We reverse and remand.

This Court reviews de novo matters of statutory interpretation, as well as the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Summary disposition pursuant to MCR 2.116(C)(7) is appropriate if a "claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor." *Id*. We otherwise review de novo the trial court's determinations of law; however, any factual findings made by the trial court in support of its decision are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). Under the clear error standard, this Court defers to the trial court unless definitely and firmly convinced that the trial court made a mistake, and under the abuse of discretion standard, this Court

"cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Id*. at 472.

An AOM generally must be filed with a medical malpractice complaint. MCL 600.2912d(1). Ordinarily, a complaint filed without an AOM is "insufficient to commence the lawsuit" and does not toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000) (quotation marks and citation omitted). However, the Legislature has provided for certain narrow exceptions to that general requirement; in relevant part, MCL 600.2912d(2) provides: "Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1)."

Consequently, a medical malpractice plaintiff may, under appropriate circumstances, be permitted to file their AOM up to 28 days *after* filing the complaint.[1] Our Supreme Court has expressly recognized that a plaintiff may be unable to obtain an AOM within the requisite time period, in which case "the plaintiff's attorney *should* seek the relief available in

[1] Other exceptions may apply under circumstances not relevant to the instant matter. We do not discuss any such additional exceptions here. We also note that we are aware that our Supreme Court has recently reiterated that "a medical malpractice action can only be commenced by filing a timely NOI [notice of intent] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired." *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d 213 (2015). This general rule governing the commencement of medical malpractice actions is inapplicable here. The exception at issue here was neither before the Court in *Tyra* nor even mentioned by the Court, and the Court emphasized in no uncertain terms that matters not directed to its attention by counsel would not be considered. *Id*. at 88-89. *Tyra* adds nothing to the question at issue in the case at bar.

MCL 600.2912d(2) . . . ." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 228-229; 561 NW2d 843 (1997) (emphasis added). If the trial court finds "a showing of good cause, an additional twenty-eight days [are permitted] to obtain the required affidavit of merit." *Id*. at 229. "During this period, the statute will be tolled and summary disposition motions on the ground of failure to state a claim should not be granted." *Id*.

This Court has clarified that it is ultimately the granting of the motion that effectuates the 28-day tolling, not merely filing the motion. *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 692; 625 NW2d 470 (2001). Furthermore, the tolling period only runs from the date the complaint is filed; it cannot resurrect a claim where the complaint itself was untimely. *Ligons v Crittenton Hosp*, 490 Mich 61, 74-75, 84-85; 803 NW2d 271 (2011). However, in this case plaintiffs filed their complaint within the two-year limitations period, their motion for additional time was granted,[2] and they filed their AOM fewer than 28 days after the date on which they filed their complaint.[3] Consequently, plaintiffs acted properly pursuant to

[2] Defendants raise an alternative argument that no "good cause" was shown. As we will discuss later in this opinion, we disagree.

[3] The alleged malpractice occurred on February 9, 2011, so the limitations period was set to expire on February 9, 2013. See MCL 600.5805(6). Plaintiffs filed their complaint and their motion to extend the time for filing an AOM on February 4, 2013, and their AOM on February 26, 2013. The dissent relies on our Supreme Court's analysis in *Gladych v New Family Homes, Inc*, 468 Mich 594, 603-604; 664 NW2d 705 (2003), for the proposition that the limitations period was not tolled because the order granting plaintiff's request for a 28-day extension was not entered until March 8, 2013. This ignores the fact that *by statute*, MCL 600.2912d(2) provides for an *extension* of the period within which to file and for what is effectively the "perfection" of a complaint initially filed without an AOM with a later filing of the AOM. Furthermore, the continuing vitality of *Gladych* is highly

both statute and caselaw.[4]

Defendants and the dissent believe it is relevant that the trial court granted plaintiffs' motion on March 8, 2013, which is of course well after the expiration of the 28-day period. The only relevance is the fact that, as noted, the trial court actually granted the motion. MCL 600.2912d(2) explicitly affords "an additional 28 days in which to file the affidavit required under subsection (1)," which in turn specifies that the affidavit should be filed with the complaint. Our Supreme Court's discussion of the statute likewise articulates the need for an AOM at the commencement of an action, unless an *additional* 28 days are provided by the granting of a motion under MCL 600.2912d(2). *Ligons*, 490 Mich at 84; *Solowy*, 454 Mich at 229. That period is "an extension." *Scarsella*, 461 Mich at 552. By statute and by precedent, the 28-day period must run from the date the complaint is filed, irrespective of when the motion is granted. Not only would a contrary holding violate the plain reading of the statute, it would also make a plaintiff's rights turn not on the plaintiff's compliance with the procedures established by the Legislature, but rather purely on the vagaries of

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doubtful, given that the Legislature amended MCL 600.5856 after that case was decided to clarify that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." The tolling criteria were satisfied here.

[4] We are puzzled by the dissent's citation to *Holmes v Mich Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000). In that case, this Court explicitly stated that the limitations period at issue was not tolled and thus the claim was not timely brought "[b]ecause plaintiffs failed to comply with MCL 600.2912d; MSA 27A.2912(4) by filing an affidavit of merit with their complaint *or by requesting an extension of time in which to file their affidavit* . . . ." *Id.* at 709 (emphasis added). *Holmes* supports rather than refutes our position. Moreover, *Holmes* does not address the impact of a trial court's delayed grant of a requested extension. We fail to perceive the relevance of *Holmes*.

when the trial court, or more likely not even the court but rather a docketing clerk, chooses to hear or docket the motion. In effect, the dissent and defendants would render MCL 600.2912d(2) nugatory.[5]

The obvious significance of the timing requirements in MCL 600.2912d(2) is that a plaintiff who makes a motion to extend time must proceed on the assumption that the motion will be granted. Conversely, the trial court need not go to particular lengths to rush the matter, which could risk a less-than-optimal decision for either party. Because plaintiffs complied with the requirements of the statute, and they filed their complaint and motion within the two-year limitations period and their AOM within 28 days thereafter, the only remaining issue is defendant's alternate argument that plaintiffs failed to show good cause.

"Good cause" is not defined in the statute. The term has, in such undefined circumstances, been found "so general and elastic in its import that we cannot presume any legislative intent beyond opening the door for the court to exercise its best judgment and discretion in determining if conditions exist which excuse the delay when special circumstances are proven to that end." *Lapham v Oakland Circuit Judge*, 170 Mich 564, 570; 136 NW 594 (1912). The trial court's finding of good cause, or for that matter of a lack of good cause, is consequently a highly discretionary one. *Id*. at 570-571. As discussed, we will disturb a trial court's exercise of discretion only if the result falls outside the range of principled outcomes. *Herald Co, Inc*, 475 Mich at 472.

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[5] The dissent inexplicably concludes that plaintiffs are *not* at the mercy of the potentially capricious or arbitrary whims of a docketing clerk or a potentially full docket, because plaintiffs can—and plaintiffs here did not—express a plea for expeditiousness. We are unable to locate any court rule or statute requiring such a plea.

According to the complaint, defendant doctors performed a left hip arthroscopic surgical procedure on plaintiff Ruben Castro. Before the surgery, he did not have erectile dysfunction, but afterward, he suffered from decreased sensation in his penis, pain when urinating, and erectile dysfunction causing the inability to procreate. Plaintiffs alleged that Ruben's injuries were caused by defendants' negligent "use of the perineal traction post using excessive pressure, and employing the same for a period in excessive [sic] of two [2] hours both being contrary to the standard of practice." Plaintiffs also alleged that defendants failed to inform Ruben that erectile dysfunction was a possible consequence of the procedure. Plaintiffs contend that he would not have undergone surgery if he had known of that possible side effect. In addition to negligence, plaintiffs alleged a loss of consortium.

Of significance to the issue on appeal, defendants contended that plaintiffs had unreasonably procrastinated in bringing the instant action. Plaintiffs argued that the reason for the delay was that doctors had told Ruben "that erectile dysfunction which may occur from surgery in which a perineal traction post is utilized goes away, after weeks or months" but that no such promised recovery occurred for Ruben. Plaintiffs stated they would have filed the lawsuit earlier if medical professionals had not advised Ruben that erectile dysfunction would subside and then completely phase out weeks or months after surgery. In other words, plaintiffs delayed because of defendants' assurances that the complications Ruben suffered would end on their own. The purpose of the AOM requirement in MCL 600.2912d is to deter the filing of frivolous medical malpractice claims. *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998). Plaintiffs attempted, on the basis of defen-

dants' assurances, to achieve precisely the same effect and avoid filing a needless suit. Under the circumstances, we simply cannot find that the trial court's decision to allow plaintiffs the 28-day extension was outside the range of principled outcomes. The trial court had ample grounds to find good cause and we find there was no abuse of discretion in granting the allowed statutory extension.

The trial court properly granted plaintiffs' motion to extend the time in which to file their AOM, and plaintiffs properly complied with all of the timing requirements set forth in MCL 600.2912d. Consequently, plaintiffs' action was timely commenced, and the trial court should not have granted summary disposition pursuant to MCR 2.116(C)(7) on the basis of it being untimely. We therefore reverse and remand for further proceedings. We do not retain jurisdiction.

STEPHENS, J., concurred with RONAYNE KRAUSE, P.J.

WILDER, J. (*dissenting*). I respectfully dissent.

In *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d 213 (2015), our Supreme Court reiterated that

> [a]lthough a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI [notice of intent] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but *before* the period of limitations has expired. [Emphasis added.]

This holding by the Supreme Court reflects the rule of law established in *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required

affidavit of merit [AOM] is insufficient to commence the lawsuit." (Quotation marks and citation omitted.)

In the instant case, when plaintiffs filed their complaint on February 4, 2013, they did not file an AOM. Thus, the action against defendants did not commence on February 4, 2013. However, plaintiffs filed a motion under MCL 600.2912d(2) to extend the time for filing the requisite AOM. The trial court granted that motion on March 8, 2013, and the majority concludes that the granting of plaintiffs' motion operated retroactively to toll the running of the period of limitations, such that "plaintiffs acted properly pursuant to both statute and caselaw," and plaintiffs' complaint and AOM should be deemed timely filed. I respectfully disagree.

The period of limitations for an action charging malpractice is two years. MCL 600.5805(6). According to plaintiffs, defendants' malpractice occurred on February 9, 2011. Thus, the period of limitations for defendants' alleged malpractice, absent tolling, was scheduled to expire on February 9, 2013. This means that plaintiffs were required to commence their action against defendants by February 9, 2013, unless plaintiffs took some action to toll the running of the limitations period. There is no dispute that plaintiffs' action was not commenced by February 9, 2013. There is also no dispute that as of February 9, 2013, the period of limitations had not been tolled. Thus, as in *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2000), plaintiffs' efforts to remedy their failure to file an AOM with their complaint—in this case, plaintiffs filed a motion under MCL 600.2912d(2) to extend the time for filing an AOM—were, unfortunately, insufficient because their efforts culminated *beyond* the limitations period.

The majority concludes that this application of *Scarsella* and its progeny renders MCL 600.2912d(2) nugatory. I disagree. As statutes sharing a common purpose, MCL 600.2912d(2) and MCL 600.5805(6) must be read together as one and construed in a way that produces a harmonious whole. *Mich Basic Prop Ins Ass'n v OFIR*, 288 Mich App 552, 559-560; 808 NW2d 456 (2010) ("When construing statutes, the terms of statutory provisions with a common purpose should be read *in pari materia*. . . . Conflicting provisions of a statute must be read together to produce an [sic] harmonious whole and to reconcile any inconsistencies wherever possible.") (quotation marks and citations omitted); *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 563; 710 NW2d 59 (2005) ("Statutes that relate to the same subject must be read together as one, even if they contain no reference to one another."). In my judgment, construing MCL 600.2912d(2) in a manner that requires a plaintiff to obtain, *before* the statutory period of limitations expires, a court order granting an extension to file the AOM so that the cause of action against a defendant can be *commenced before* the period of limitations expires, gives meaning to both statutes.

The defining principle of law is that an action must be commenced before the period of limitations for that cause of action expires. See MCL 600.5805(1) ("A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is *commenced* within the periods of time prescribed by this section.") (emphasis added); *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006); *Gladych v New Family Homes, Inc*, 468 Mich

594, 598; 664 NW2d 705 (2003).[1] Operating together, it is clear that the statutes underlying medical malpractice claims respect that defining principle of law. Under MCL 600.5856(c), filing a notice of intent to file suit tolls the running of the period of limitations. *Tyra*, 498 Mich at 79. Upon expiration of the notice period, the period of limitations resumes running. Cf. *Gladych*, 468 Mich at 603-604.[2] Filing a complaint and an affidavit of merit, MCL 600.2912d(1), or the granting of a motion for an extension of time to file the AOM, MCL 600.2912d(2), again operates to toll the running of the statutory period of limitations. See *Tyra*, 498 Mich at 79 n 8; *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997). However, each effort to toll the running of the period of limitations, as well as the actual commencement of plaintiffs' cause of action, must occur before the period of limitations expires.[3]

The majority holds that construing MCL 600.2912d(2) to mean something other than that "the 28-day period must run from the date the complaint is

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[1] The Legislature amended MCL 600.5856 after the *Gladych* opinion issued. The amended statute specifies that a statutory period of limitations is tolled when a complaint is filed before the period of limitations expires "if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a).

[2] Rather than as binding precedent in the instant case, I cite to *Gladych* merely to illustrate, by analogy, that the period of limitations resumes running after previously being properly tolled for some period of time.

[3] Moreover, although in *Pryber v Marriott Corp*, 98 Mich App 50, 56; 296 NW2d 597 (1980), this Court concluded that the Legislature, through the enactment of a retroactive law, may revive a cause of action which has already been barred by the application of a previously existing statute of limitations, I am unable to find any caselaw, and the majority cites to none, which supports the proposition that an untimely cause of action barred by application of an expired period of limitations may be subsequently revived by the decision of a court of law.

filed, irrespective of when the motion is granted," would "make a plaintiff's rights turn not on the plaintiff's compliance with the procedures established by the Legislature, but rather purely on the vagaries of when the trial court, or more likely not even the court but rather a docketing clerk, chooses to hear or docket the motion." Again, I respectfully disagree. It is apparent from this record that plaintiffs did not use the means they had available to them, which if used, could have prevented the expiration of the period of limitations before their motion to extend was granted. Under MCR 2.119(C), a trial court may adjust the time for the service and filing of motions and responses "for good cause." Notably, plaintiffs did not request an expedited hearing of their motion to extend the time for filing the AOM, and they failed to emphasize on the cover page of their motion that there was an urgency in hearing the pending motion because the period of limitations would expire on February 9, 2013.[4] To avoid creating a vagarious situation, it is not an onerous expectation that a plaintiff in these circumstances would make more than a modicum of effort to seek an expedited

[4] Not only did the cover page of plaintiffs' motion not contain any information that would have alerted the trial court or the docketing clerk to the fact that the motion required urgent attention, the contents of the motion stated only the following with regard to the urgency attendant to filing the motion. On page three of the motion, plaintiffs stated that "it appears that the [AOM] shall not be prepared until after February 8, 2013," due to the expert's busy schedule. Also on page three, plaintiffs explained that, "[a]lthough it may appear [that] the filing of this medical malpractice action was held to the last possible time," they waited to file their claim because plaintiff Ruben Castro had been informed that his symptoms would cease some number of weeks or months after the surgery, and he still suffered from the condition "just short of two [2] years from the date of surgery on February 9, 2011." While plaintiffs hint at a statutory period of limitations problem, plaintiffs' motion did not expressly identify this impending problem for the trial court.

hearing date from a trial court or a docketing clerk, neither of whom can be reasonably expected, without prompting by the moving party, to read through every motion filed in the trial court in order to identify those particular matters that require urgent attention. Thus, contrary to the majority, I would find that plaintiffs failed to make reasonable efforts to request that the trial court suspend the normal time limits imposed under MCR 2.119(C) due to the impending expiration of the period of limitations, and that the facts of this case do not warrant holding either the trial court or the docketing clerk responsible for plaintiffs' failure to commence their cause of action against defendants in a timely manner.

Contrary to the majority's findings, I would find that (1) because plaintiffs did not include an AOM with the complaint filed on February 4, 2013, the lawsuit was not commenced under *Scarsella*, (2) under *Ligons*[5] and *Barlett*,[6] the motion plaintiffs filed to extend time for filing the AOM had no tolling effect, and (3) because the period of limitations expired on February 9, 2013, before the trial court granted the motion to extend, the trial court properly found that its March 8, 2013 order had no tolling effect.

I would affirm.

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[5] *Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011).

[6] *Barlett v North Ottawa Comm Hosp*, 244 Mich App 685; 625 NW2d 470 (2001).

PEOPLE v SKINNER

Docket No. 317892. Submitted May 8, 2015, at Detroit. Decided August 20, 2015, at 9:05 a.m. Leave to appeal sought.

Tia Marie-Mitchell Skinner was charged in the St. Clair Circuit Court and convicted of first-degree premeditated murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a, following a jury trial. The charges stemmed from defendant's arrangement to have her parents murdered when she was 17 years old. The court, Daniel J. Kelly, J., sentenced defendant to mandatory life without parole for the first-degree-murder conviction and life sentences for the attempted murder and conspiracy convictions. Defendant appealed. While her appeal was pending, the United States Supreme Court decided *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012), holding that a mandatory sentence of life without parole for a juvenile offender violates the Eighth Amendment. Subsequently, the Court of Appeals, SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ., affirmed defendant's convictions and the life sentences for attempted murder and conspiracy in an unpublished opinion per curiam, issued February 21, 2013 (Docket No. 306903), but remanded for resentencing on defendant's first-degree-murder conviction to consider the factors set forth in *Miller*. The trial court held a resentencing hearing and again sentenced defendant to life without parole for the first-degree-murder conviction, and defendant appealed that sentence. While that appeal was pending, the Legislature enacted MCL 769.25 in response to *Miller*, establishing a framework for imposing a sentence of life without parole on a juvenile. After the Michigan Supreme Court decided *People v Carp*, 496 Mich 440 (2014), which concerned the retroactivity of *Miller*, the Court of Appeals remanded this case for a resentencing hearing in accordance with MCL 769.25. On remand, defendant moved to empanel a jury, arguing that a jury should make the factual findings mandated by MCL 769.25(6). The trial court denied defendant's motion and after hearing evidence from both defendant and the prosecution, again sentenced defendant to life without parole for the first-degree-murder conviction. Defendant appealed, arguing that MCL 769.25 violated her Sixth Amendment right to a jury

because it exposed her through judicial fact-finding to a harsher penalty than was otherwise authorized by the jury's verdict.

The Court of Appeals *held*:

1. *Miller* categorically barred mandatory sentences of life without parole for juveniles. *Miller* allowed the imposition of an individualized life-without-parole sentence in homicide cases, however, in the rare situation of a juvenile whose crime reflected irreparable corruption and discussed a range of factors relevant to a court's determination of whether a particular juvenile was such an offender. Those factors are the juvenile's chronological age and its hallmark features (such as immaturity, impetuosity, and the failure to appreciate risks and consequences), the juvenile's family and home environment (including whether that environment was brutal or dysfunctional and whether the juvenile could have extricated himself or herself from it), the circumstances of the homicide (including the extent of the juvenile's participation and the way familial and peer pressures might have affected him or her), whether the juvenile might have been charged with and convicted of a lesser offense if not for the incompetence associated with youth (such as an inability to deal with police officers or prosecutors, including on a plea agreement, and the juvenile's incapacity to assist his or her own attorneys), and whether the juvenile exhibited the potential for rehabilitation.

2. As a response to *Miller*, MCL 769.25(2) allows the prosecuting attorney to file a motion to sentence the juvenile to life without parole if a defendant was less than 18 years of age when he or she committed any of certain offenses, including first-degree murder. If the prosecuting attorney does not file the motion, MCL 769.25(4) and (9) require the court to sentence the juvenile to a term of years, with a maximum term of not less than 60 years and a minimum term of not less than 25 years or more than 40 years. This constitutes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age. If the prosecuting attorney does file a motion for a life-without-parole sentence, however, MCL 769.25(6) requires the court to conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court must consider the factors listed in *Miller* and may consider any other criteria relevant to its decision, including the juvenile's record while incarcerated. Under MCL 769.25(7), the court must specify on the record the aggravating and mitigating circumstances it considered and the reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

3. In a line of cases that began with *Apprendi v New Jersey*, 530 US 466 (2000), and culminated with *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), the United States Supreme Court held that other than a prior conviction, any fact that increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury's verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. The touchstone for determining whether a jury must find the fact is whether the fact constitutes an "element" or an "ingredient" of the charged offense. A fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. When a finding of fact alters the legally prescribed punishment so as to aggravate it, that fact necessarily forms a constituent part of a new offense and must be submitted to the jury. In this case, following the jury's verdict and absent a prosecution motion seeking a sentence of life without parole, the legally prescribed maximum punishment that defendant faced for her first-degree-murder conviction was imprisonment for a term of years. Because MCL 769.25 authorizes a trial court to enhance that sentence to life without parole on the basis of factual findings on the *Miller* factors that were not made by a jury beyond a reasonable doubt but were found by the court, the statute offends the Sixth Amendment and defendant was entitled to resentencing on that offense.

4. Although portions of MCL 769.25 are unconstitutional, the statute was not void in its entirety. MCL 769.25 remains operable if the findings on the *Miller* factors are made by a jury beyond a reasonable doubt. That is, following a conviction of first-degree murder and a motion by the prosecuting attorney for a sentence of life without parole, absent the defendant's waiver the trial court should empanel a jury and hold a sentencing hearing at which the prosecution must prove that the *Miller* factors support a conclusion that the offense reflects irreparable corruption beyond a reasonable doubt. During this hearing, both sides must be afforded the opportunity to present relevant evidence, and each victim must have the opportunity to offer testimony in accordance with MCL 769.25(8). Following the close of proofs, the trial court should instruct the jury that it must consider whether in light of the *Miller* factors and any other relevant evidence, the defendant's offense reflects irreparable corruption beyond a reasonable doubt sufficient to impose a sentence of life without parole. Alternatively, if the jury decides this question in the

negative, then the court should use its discretion to sentence the juvenile to a term of years in accordance with MCL 769.25(9).

Sentence vacated and case remanded for resentencing.

SAWYER, J., dissenting, concluded that *Apprendi* and its progeny established only that the Sixth Amendment right to a jury trial requires the jury to find those facts necessary to impose a sentence greater than that authorized in the statute itself on the basis of the conviction itself. The question is not whether the court engages in judicial fact-finding, but whether the defendant is entitled to a lesser sentence without those facts being found. Nothing in MCL 769.25 established a legal entitlement for a juvenile defendant to be sentenced to a term of years rather than life. A juvenile offender who committed first-degree murder knows that he or she is risking being sentenced to life in prison without parole simply upon the jury's conviction for first-degree murder without the necessity of the jury's finding any additional facts regarding the crime. MCL 769.25(6) requires the trial court to conduct a hearing before it may impose a sentence of life without parole on a juvenile offender and requires that the trial court consider the factors listed in *Miller*, as well as any other criteria the trial court deems relevant to its decision. MCL 769.25(7) then requires the court to specify on the record the aggravating and mitigating circumstances it considered and the court's reasons supporting the sentence imposed. MCL 769.25(7) does not require the trial court to find any particular facts before it is authorized to impose a sentence of life without parole. Rather, after conducting the hearing and considering the evidence presented at the hearing as well as the evidence presented at trial, the trial court makes its decision and must state on the record the reasons for that decision. Both *Miller* and the statute merely require the sentencing court to take into account the individual circumstances of the juvenile offender before determining whether a sentence of life without parole is appropriate in each particular case. Under MCL 769.25, the only factual finding necessary to authorize the trial court to impose a sentence of life without parole was that defendant's involvement in the killing of her father constituted first-degree murder. The jury concluded that it did. Therefore, *Apprendi* and the Sixth Amendment were satisfied, and the trial court had the statutory authority to impose the sentence of life without parole. Judge SAWYER would have affirmed.

1. CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — USE OF JUDICIALLY FOUND FACTS TO IMPOSE.

Under MCL 769.25(4) and (9), the default sentencing range for individuals who committed first-degree murder before turning 18

years of age is a term of years, with a maximum term of not less than 60 years and a minimum term of not less than 25 years or more than 40 years; MCL 769.25 violates the Sixth Amendment to the extent that it authorizes a trial court to enhance that default sentence to life without parole on the basis of factual findings that were not made by a jury but were found by the court, and a defendant sentenced in that manner is entitled to resentencing on the offense.

2. CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — FACTORS ALLOWING.

The Eighth Amendment allows the imposition of an individualized life-without-parole sentence in homicide cases in the rare situation of a juvenile whose crime reflected irreparable corruption; factors relevant to a court's determination of whether a particular juvenile is such an offender are the juvenile's chronological age and its hallmark features (such as immaturity, impetuosity, and the failure to appreciate risks and consequences), the juvenile's family and home environment (including whether that environment was brutal or dysfunctional and whether the juvenile could have extricated himself or herself from it), the circumstances of the homicide (including the extent of the juvenile's participation and the way familial and peer pressures might have affected the juvenile), whether the juvenile might have been charged with and convicted of a lesser offense if not for the incompetence associated with youth (such as an inability to deal with police officers or prosecutors, including on a plea agreement, and the juvenile's incapacity to assist his or her own attorneys), and whether the juvenile exhibits the potential for rehabilitation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

University of Michigan Juvenile Justice Clinic (by *Kimberly Thomas* and *Frank E. Vandervort*) for defendant.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Linus Banghart-Linn*, Assistant Attorney General, for the Attorney General.

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

BORRELLO, J. This case presents a constitutional issue of first impression concerning whether the Sixth Amendment mandates that a jury make findings on the factors set forth in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), as codified in MCL 769.25(6), before sentencing a juvenile homicide offender to life imprisonment without the possibility of parole. We hold that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentences determined by a jury. In so holding, we expressly reserve the issue of whether *this* defendant should receive the penalty of life in prison without the possibility of parole for a jury. In this case, defendant requested and was denied her right to have a jury decide any facts mandated by MCL 769.25(6) with respect to her sentence. Accordingly, we vacate her sentence for first-degree murder and remand for resentencing on that offense consistent with this opinion.

I. BACKGROUND

In November 2010, at the age of 17, defendant arranged to have her parents, Paul and Mara Skinner, murdered. Specifically,

> [t]he victims, defendant's parents, were viciously attacked in their bed in November 2010. Defendant's father was killed in the attack and defendant's mother suffered roughly 25 stab wounds. An investigation led to Jonathan Kurtz, defendant's boyfriend, and James Preston. The investigation also led to the discovery of a map of the neighborhood and a note containing tips on how to break into defendant's house and commit the murders. Cell

> phone records revealed text messages between defendant, Kurtz, and Preston that indicated that the crime had been planned by all three. During an interview with police, defendant implicated Preston, then implicated Kurtz and Preston, and then admitted that she had talked to Kurtz about killing her parents. Defendant said that Kurtz was going to seek Preston's help.[1]

Defendant was charged in connection with the attacks and, following a trial, a jury convicted her of first-degree premeditated murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a. On September 16, 2011, the trial court sentenced defendant to mandatory life without parole for the first-degree-murder conviction and life sentences each for the attempted-murder and conspiracy-to-commit-murder convictions. Defendant appealed her convictions and sentences.

While defendant's appeal was pending, on June 25, 2012, the United States Supreme Court decided *Miller*, 567 US at ___; 132 S Ct at 2460, wherein the Court held that mandatory sentences of life without parole for juvenile offenders violated the Eighth Amendment. Subsequently, this Court affirmed defendant's convictions and life sentences for attempted murder and conspiracy, but remanded for resentencing on defendant's first-degree-murder conviction to consider the factors set forth in *Miller*.[2]

On July 11, 2013, the trial court held a resentencing hearing and again sentenced defendant to life without parole for the first-degree-murder conviction. Defendant again appealed her sentence. On March 4, 2014, while defendant's appeal was pending, MCL 769.25

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[1] *People v Skinner*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2013 (Docket No. 306903), p 1.

[2] *Id*.

took effect, which had been enacted in response to *Miller* and established a framework for imposing a sentence of life without parole on a juvenile convicted of, *inter alia*, first-degree murder. Meanwhile, this Court ordered defendant's appeal held in abeyance pending our Supreme Court's decision in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), which concerned the retroactivity of *Miller*. Following the decision in *Carp*, this Court remanded defendant's case to the trial court for a second resentencing—third sentencing—hearing to be conducted in accordance with MCL 769.25; this Court retained jurisdiction.[3]

On second remand, defendant moved to empanel a jury, arguing at the resentencing hearing that a jury should make the factual findings mandated by MCL 769.25(6). The trial court denied defendant's motion, and this Court denied defendant's emergency application for leave to appeal that order.[4] Thereafter, the trial court held the second resentencing hearing on September 18, 19, and 24, 2014, and, after hearing evidence from both defendant and the prosecution, the court again sentenced defendant to life without parole for the first-degree-murder conviction. Defendant now appeals that sentence as of right, arguing, *inter alia*, that MCL 769.25 violates her Sixth Amendment right to a jury because it exposes her to a harsher penalty than was otherwise authorized by the jury verdict.

II. STANDARD OF REVIEW

We review constitutional issues de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Issues of

[3] *People v Skinner*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892).

[4] *People v Skinner*, unpublished order of the Court of Appeals, entered September 17, 2014 (Docket No. 323509).

statutory construction are also reviewed de novo. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

III. GOVERNING LAW

This case brings us to the intersection of the Sixth and Eighth Amendments of the United States Constitution. Specifically, the issue before us illustrates, following *Miller*, the interplay between the Eighth Amendment's limitations with respect to sentencing a juvenile to life imprisonment without the possibility of parole and a juvenile's right to a jury trial under the Sixth Amendment. We proceed with a review of the seminal case of *Miller* before discussing *Miller*'s impact on Michigan's sentencing scheme; we then review relevant United States Supreme Court Sixth Amendment jurisprudence before applying that precedent to Michigan's post-*Miller* juvenile-sentencing scheme.

A. *MILLER v ALABAMA*

Miller is part of a line of growth in the Supreme Court's Eighth Amendment jurisprudence relative to juvenile offenders. This precedent can in part be traced back to *Thompson v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988), wherein a plurality of the Court held that the Eighth Amendment categorically barred "the execution of any offender under the age of 16 at the time of the crime." *Roper v Simmons*, 543 US 551, 561; 125 S Ct 1183; 161 L Ed 2d 1 (2005), citing *Thompson*, 487 US at 818-838 (opinion by Stevens, J.). Subsequently, in *Roper*, 543 US at 568-579, the Court expanded on the rationale in the *Thompson* plurality and held that the Eighth Amendment categorically barred imposition of the death penalty on all juveniles under the age of 18 when their crimes were

committed, irrespective of the offense. The Court reasoned that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Id*. at 568 (quotation marks and citation omitted). The Court reasoned that because of the unique differences between juveniles and adults, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569. In particular, the Court noted, juveniles exhibit " '[a] lack of maturity and underdeveloped sense of responsibility' " that " 'often result in impetuous and ill-considered actions and decisions.' " *Id*. (citation omitted) (alteration in original). Additionally, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and "the character of a juvenile is not as well formed as that of an adult." *Id*. at 569-570. Thus, "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders . . . ." *Id*. at 572.

Following *Roper*, under the Eighth Amendment the maximum penalty that could be imposed on a juvenile offender was life imprisonment without the possibility of parole. The Court further limited that form of punishment in *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and *Miller*. Specifically, in *Graham*, the Court held that the Eighth Amendment categorically barred a sentence of life without parole for juvenile "nonhomicide offenders." *Graham*, 560 US at 74. The *Graham* Court reasoned that juveniles "who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment . . . ." *Id*. at 69. The Court explained that, unlike "nonhomicide" offenses, homicide is unique with respect to its "moral deprav-

ity" and the injury it inflicts on its victim and the public and concluded: "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id*. (quotation marks and citations omitted). The Court proceeded to establish a bright-line categorical bar on sentences of life without parole for juvenile nonhomicide offenders. *Id*. at 74. Although a state was not "required to guarantee eventual freedom," juveniles convicted of nonhomicide offenses were to be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75.

Building on *Roper* and *Graham*, the Supreme Court held in *Miller* that, irrespective of the offense, *mandatory* life sentences without the possibility of parole for juvenile offenders violated the Eighth Amendment. *Miller*, 567 US at ___; 132 S Ct at 2460. Given the unique characteristics of juveniles, the Court reasoned, the Eighth Amendment required consideration of an offender's youthfulness during sentencing, something that mandatory sentencing schemes failed to do. *Id*. at ___; 132 S Ct at 2464-2466. The Court explained:

> Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. "An offender's age," we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take

> defendants' youthfulness into account at all would be flawed." [*Id*. at ___; 132 S Ct at 2465-2466 (citation omitted).]

Drawing from capital punishment cases, the Supreme Court reasoned that life-without-parole sentences were analogous to capital punishment for juveniles and, therefore, the Eighth Amendment mandated individualized sentencing for this particularly harsh form of punishment. *Id*. at ___; 132 S Ct at 2466-2467. The *Miller* Court referred to *Woodson v North Carolina*, 428 US 280, 304; 96 S Ct 2978; 49 L Ed 2d 944 (1976), wherein the Supreme Court struck down a mandatory death-penalty sentencing scheme because the scheme "gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclude[ed] from consideration . . . the possibility of compassionate or mitigating factors.' " *Miller*, 567 US at ___; 132 S Ct at 2467 (alteration in original). Additionally, the Supreme Court noted that

> [s]ubsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. [*Id*. at ___; 132 S Ct at 2467 (citations omitted).]

In the context of juveniles, the Supreme Court's individualized sentencing jurisprudence illustrated the importance that "a sentencer have the ability to consider the mitigating qualities of youth" in assessing culpability including, among other things, age, background, and mental and emotional development. *Id*. at ___; 132 S Ct at 2467 (quotation marks and citation omitted).

The Supreme Court concluded that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id*. at ___; 132 S Ct at 2469. However, the Supreme Court did not categorically bar life-without-parole sentences for juveniles convicted of a homicide offense provided that the sentencer "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at ___; 132 S Ct at 2469. The Supreme Court cautioned that

> appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and *the rare juvenile offender whose crime reflects irreparable corruption*." [*Id*. at ___; 132 S Ct at 2469, quoting *Roper*, 543 US at 573 (emphasis added).]

Thus, after *Miller*, mandatory life-without-parole sentences for juvenile offenders are unconstitutional in all cases; however, in homicide cases, an individualized life-without-parole sentence may be imposed when the crime reflects "irreparable corruption." The *Miller* Court did not establish a bright-line test to determine whether a juvenile's crime reflects irreparable corruption; instead, "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a ' "rare juvenile offender whose crime reflects irreparable corruption." ' " *People v Gutierrez*, 58 Cal 4th 1354, 1388; 171 Cal Rptr 3d 421; 324 P3d 245 (2014), quoting *Miller*, 567 US at ___; 132 S Ct at 2469. Those factors were set forth as follows:

> . . . Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Miller*, 567 US at ___; 132 S Ct at 2468.]

Miller, therefore, categorically barred mandatory life-without-parole sentences for juveniles, but in doing so, the Supreme Court also set forth a framework for imposing that sentence when a juvenile's homicide offense reflects irreparable corruption. That is, the Supreme Court provided factors to be used during sentencing that serve as a guidepost for determining whether a juvenile's homicide offense reflects irreparable corruption.

B. MICHIGAN'S SENTENCING SCHEME POST-*MILLER*

Miller had a wide-ranging effect nationwide in that, with respect to juvenile offenders, it invalidated state statutes that imposed mandatory life-without-parole-sentences.[5] In Michigan, the Legislature enacted 2014

[5] See, e.g., Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L Rev 553, 583 (2015)

PA 22, codified at MCL 769.25 and MCL 769.25a,[6] in response to *Miller*. Relevant to this case, MCL 769.25 provides in pertinent part:

> (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:
>
> (a) The defendant is convicted of the offense on or after [March 4, 2014].
>
> (b) The defendant was convicted of the offense before [March 4, 2014] and either of the following applies:
>
> (*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.
>
> (*ii*) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.
>
> (2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:
>
> * * *
>
> (b) A violation of . . . [MCL 750.316] . . . .[7]
>
> * * *

(noting that "in the mere two years since *Miller* was decided, the decision has been cited in more than 1000 cases nationwide" and that "sixteen state legislatures have enacted statutes in response to *Graham* and *Miller*, and many others are considering bills").

[6] MCL 769.25a concerns the retroactivity of MCL 769.25, and it is not at issue in this case.

[7] In addition to first-degree murder, MCL 769.25(2)(a) through (d) provide that a prosecuting attorney may move for imposition of a life-without-parole sentence for juveniles convicted of several other offenses. Subdivision (a) includes MCL 333.17764(7) (mislabeling drugs

(3) . . . If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after [March 4, 2014]. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, *the court shall sentence the defendant to a term of years* as provided in subsection (9).

* * *

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing,

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with intent to kill). Besides first-degree murder, Subdivision (b) includes MCL 750.16(5) (adulteration of drugs with intent to kill); MCL 750.18(7) (mixing drugs improperly with intent to kill); MCL 750.436(2)(e) (poisoning); and MCL 750.543f (terrorism). Subdivision (c) includes Chapter XXIII of the Michigan Penal Code, MCL 750.200 to MCL 750.212a, concerning explosives. And finally, Subdivision (d) includes any other violation involving the death of another for which parole eligibility is expressly denied by law. The issue of whether these offenses constitute "homicide offenses" under *Graham* and *Miller* for purposes of sentencing juvenile offenders to life without parole is not before this Court. See, e.g., *Graham*, 560 US at 68-69 (noting in categorically barring life-without-parole sentences for juveniles convicted of nonhomicide offenses that "because juveniles have lessened culpability they are less deserving of the most severe punishments" and that "defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers") (emphasis added). See also *Miller*, 567 US at ___; 132 S Ct at 2475-2476 (Breyer, J., concurring) (stating that "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole *must exclude instances where the juvenile himself neither kills nor intends to kill the victim*") (emphasis added). For purposes of this case, there is no dispute that premeditated first-degree murder constitutes a homicide offense under *Graham* and *Miller* for which defendant is eligible to receive life without parole.

> the trial court shall consider the factors listed in Miller v Alabama, 576 [sic] US _____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
>
> * * *
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [Emphasis added.]

This legislation "significantly altered Michigan's sentencing scheme for juvenile offenders convicted of crimes that had previously carried a sentence of life without parole." *Carp*, 496 Mich at 456. Specifically, under this new scheme,

> [r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, *MCL 769.25 now establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,
>
> > *the court shall sentence the individual to a term of imprisonment* for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25(4) and (9).]

> When, however, the prosecutor does file a motion seeking a life-without-parole sentence, the trial court "shall conduct a hearing on the motion as part of the sentencing process" and "shall consider the factors listed in Miller v Alabama . . . ." MCL 769.25(6). Accordingly, the sentencing of juvenile first-degree-murder offenders now provides for the so-called "individualized sentencing" procedures of *Miller*. [*Id*. at 458-459 (emphasis added) (bracketed citation in original).]

Thus, in response to *Miller*, and as explained in *Carp*, the Michigan Legislature created a default sentence for juvenile defendants convicted of first-degree murder. The default sentence is a term of years. See MCL 769.25(4) (providing that absent the prosecution's motion for a life-without-parole sentence, "the court *shall sentence the defendant to a term of years* as provided in subsection (9)") (emphasis added). Alternatively, a life-without-parole sentence may be imposed if the following framework is adhered to: (1) the prosecution timely files a motion seeking a life-without-parole sentence, (2) the trial court holds a sentencing hearing, (3) at the hearing, the trial court considers the factors listed in *Miller* (and "may consider any other criteria relevant to its decision"), and (4) the trial court specifies "the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed" (and "may consider evidence presented at trial *together with any evidence presented at the sentencing hearing*"). MCL 769.25(3), (6), and (7) (emphasis added).

Defendant contends that this sentencing scheme violates her Sixth Amendment right to a jury because it exposes her to a potential life-without-parole sentence, which is greater than the sentence otherwise authorized by the jury verdict standing alone.

The *Miller* Court did not address the issue of *who* should decide whether a juvenile offender receives a life-without-parole sentence, and we are unaware of any court that has addressed the issue. In the final paragraph of its opinion, the Court stated: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that *a judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 US at ___; 132 S Ct at 2475 (emphasis added). This passing reference to "a judge or jury" is not dispositive of the issue. "The Court's decision in *Miller* does not discuss who is empowered to make the sentencing decision that the case involves a 'rare' instance where the juvenile is 'irreparably corrupt' and may be sentenced to life without parole." Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L Rev 553, 569 (2015). Instead, "*Miller* generally avoids the issue by referencing the 'sentencer' throughout the opinion, rather than specifying a judge or a jury." *Id*. Moreover, "[b]ecause Sixth Amendment jury rights can be waived, *Miller*'s reference to the judge as a possible sentencer is hardly dispositive." *Id*. (citation omitted). Indeed, in declining to address this issue,[8] our Supreme Court noted in *Carp* that, given recent Sixth Amendment jurisprudence, "*Miller*'s reference to indi-

[8] In *Carp*, our Supreme Court noted:

> As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne* [*v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013)]. [*Carp*, 496 Mich at 491 n 20.]

vidualized sentencing being performed by a '*judge* or jury' might merely be instructive on the issue but not dispositive." *Carp*, 496 Mich at 491 n 20.

Because *Miller* did not directly address the issue of who decides a life sentence without the possibility of parole, and because there is no caselaw on point, we turn to the United States Supreme Court's relevant Sixth Amendment jurisprudence for guidance.

C. SIXTH AMENDMENT RIGHT TO A JURY

In relevant part, the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." US Const, Am VI. The rights afforded under the Sixth Amendment are incorporated to the states by the Due Process Clause of the Fourteenth Amendment. *Presley v Georgia*, 558 US 209, 211-212; 130 S Ct 721; 175 L Ed 2d 675 (2010). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt' " and are deeply rooted in our nation's jurisprudence:

> [T]he historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone,

> Commentaries on the Laws of England 343 (1769) . . . . [*Apprendi v New Jersey*, 530 US 466, 477; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (citation omitted) (all alterations but first in original).]

Cognizant of this historical backdrop, the United States Supreme Court has recently expanded the scope of a criminal defendant's Sixth Amendment right to a jury in several cases commencing with *Apprendi*. In that case, the defendant pleaded guilty of, *inter alia*, a second-degree weapons offense, which carried a maximum penalty of between 5 and 10 years' imprisonment under New Jersey law. *Id*. at 469-470. Thereafter, the prosecutor filed a motion to enhance the defendant's sentence under a New Jersey hate-crime statute that permitted a sentencing judge to impose an enhanced sentence of up to 20 years upon a finding that the offender acted "with a purpose to intimidate an individual or group" because of membership in a protected class. *Id*. Following a hearing, the sentencing judge found by a preponderance of the evidence that the defendant had been motivated by racial animus and sentenced him to 12 years' imprisonment, 2 more than the maximum authorized under the law without the enhancement. *Id*. at 471.

On appeal, the defendant argued, in part, that racial animus had to be proved to a jury beyond a reasonable doubt. *Id*. The Supreme Court agreed, holding that the sentence violated the defendant's right to " 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id*. at 477 (citation omitted) (alteration in original). The Court reasoned that the defendant's Sixth Amendment jury right attached to both the weapon offense and the hate-crime enhancement because "New Jersey threatened [the defendant] with certain pains if he unlawfully possessed a weapon and

with additional pains if he selected his victims with a purpose to intimidate them because of their race." *Id*. at 476. "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id*. Rather, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id*. at 494. This is because "[o]ther than the fact of a prior conviction, *any fact that increases the penalty for a crime* beyond the prescribed statutory maximum *must be submitted to a jury* and proved beyond a reasonable doubt." *Id*. at 490 (emphasis added).

Two years later, in *Ring v Arizona*, 536 US 584, 588; 122 S Ct 2428; 153 L Ed 2d 556 (2002), the Supreme Court applied *Apprendi* to Arizona's death-penalty sentencing scheme, which authorized a trial judge to increase a capital defendant's maximum sentence from life imprisonment to death on the basis of judicially found aggravating factors. The Supreme Court concluded that, " '[i]n effect, the required finding . . . expose[d] [the defendant] to a greater punishment than that authorized by the jury's guilty verdict.' " *Id*. at 604 (citation omitted) (second alteration in original). Thus, the aggravating factors acted as the "functional equivalent" of elements of a greater offense and were required to be proved to a jury beyond a reasonable doubt. *Id*. at 609. The Court explained that when " 'the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' " *Id*. at 605, quoting *Apprendi*, 530 US at 494 n 19. The relevant inquiry, the Supreme Court noted, was "one not of form but of effect," and "[*i*]*f a*

State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, *that fact*—no matter how the State labels it—*must be found by a jury beyond a reasonable doubt*." *Id*. at 602 (quotation marks and citation omitted) (emphasis added).[9]

Taken together, *Apprendi* established and *Ring* reaffirmed that other than a prior conviction, *any* finding of fact that increases a criminal defendant's maximum sentence must be proved to a jury beyond a reasonable doubt. "In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In the years following, the Supreme Court applied *Apprendi* to invalidate two state sentencing schemes in Washington and California, both of which share similarities with the sentencing scheme at issue in this case.

In *Blakely*, the Supreme Court held that Washington's determinate sentencing scheme ran afoul of *Apprendi*. In that case, the defendant pleaded guilty of, *inter alia*, second-degree kidnapping with a firearm, a Class B felony. *Id*. at 299. State law provided that Class B felonies in general carried a statutory maximum of 10 years' imprisonment; however, under the

[9] In arriving at its holding, the *Ring* Court overruled, in part, *Walton v Arizona*, 497 US 639; 110 S Ct 3047; 111 L Ed 2d 511 (1990), which had rejected a Sixth Amendment challenge to the same sentencing scheme approximately 12 years earlier. The Court reasoned that *Walton* and *Apprendi* were "irreconcilable," explaining that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 US at 589.

state's sentencing reform act, the standard sentence range for the second-degree kidnapping offense was 49 to 53 months. *Id*. The reform act authorized, but did not require, the sentencing judge to make an upward departure from the standard range upon a finding of " 'substantial and compelling reasons justifying an exceptional sentence.' " *Id*., quoting Wash Rev Code 9.94A.120(2). The act listed nonexhaustive aggravating factors justifying such a departure. *Blakely*, 542 US at 299.

Relying on the reform act, the sentencing judge departed from the recommended standard sentence range and sentenced the defendant to 90 months' imprisonment—37 months more than the upper limit of the standard range—after finding that the defendant had acted with "deliberate cruelty," one of the statutory grounds for departure. *Id*. at 300. The state argued, in part, that there was no *Apprendi* violation because the statutory maximum authorized by law was the general 10-year maximum for Class B felonies as opposed to the 49 to 53 month standard range for second-degree kidnapping. *Id*. at 303. The Supreme Court rejected this argument, explaining that for purposes of *Apprendi*, the "statutory maximum" is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. The Supreme Court stated:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" and the judge exceeds his proper authority. [*Id*. at 303-304 (citation omitted).]

The Court also rejected the state's argument that the reform act did not violate *Apprendi* because the sentencing judge retained discretion regarding whether to impose an enhanced sentence, as explained in more detail in a subsequent case:

> The State in *Blakely* had endeavored to distinguish *Apprendi* on the ground that "[u]nder the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict." We rejected that argument. The judge could not have sentenced Blakely above the standard range without finding the additional fact of deliberate cruelty. Consequently, that fact was subject to the Sixth Amendment's jury-trial guarantee. [*Cunningham v California*, 549 US 270, 283; 127 S Ct 856; 166 L Ed 2d 856 (2007), citing *Blakely*, 542 US at 304-314 (citation omitted).]

The *Blakely* Court concluded that because "[t]he judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea," the sentence ran afoul of the Sixth Amendment. *Blakely*, 542 US at 304-305.

After deciding *Blakely*, the Supreme Court held in *Cunningham* that California's determinate sentencing law (DSL) violated the Sixth Amendment.[10] In *Cunningham*, the defendant had been convicted of a sex offense. *Cunningham*, 549 US at 275. Under the DSL, the offense was punishable by a lower (6-year), middle (12-year), and upper (16-year) sentence. *Id*. The DSL provided that " 'the court shall order imposition of the

[10] In another case following *Blakely*, the Supreme Court struck down certain provisions of the Federal Sentencing Guidelines on grounds that they violated the Sixth Amendment to the extent that they mandated enhanced sentences based on judicially found facts. *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). Given that this case does not involve sentencing guidelines, *Booker* is not highly instructive for purposes of our analysis.

middle term, unless there are circumstances in aggravation or mitigation of the crime.' " *Id*. at 277 (citation omitted). At a posttrial sentencing hearing, the sentencing judge departed from the 12-year middle term and imposed the 16-year upper term after finding by a preponderance of the evidence that there were six aggravating circumstances. *Id*. at 275-276.

On appeal, the Supreme Court held that the DSL violated the Sixth Amendment, explaining, "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury*, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Id*. at 281 (emphasis added). The Court concluded that "[b]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." *Id*. at 293.

In arriving at its holding, the *Cunningham* Court rejected the California Supreme Court's view that the DSL resembled a permissible "advisory system," explaining:

> Under California's system, judges are not free to exercise their discretion to select a specific sentence within a defined range. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. Her instruction was to select 12 years, nothing less and nothing more, unless she found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of

> the evidence lies. [*Id*. at 292 (quotation marks and citation omitted).]

The *Cunningham* Court concluded, "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id*. at 293.

Apprendi and its progeny concerned judicial fact-finding in the context of a criminal defendant's maximum sentence. In *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), the Supreme Court applied *Apprendi* in the context of mandatory minimum sentences. In *Alleyne*, a jury convicted the defendant of a federal robbery offense. The sentencing court increased the defendant's mandatory minimum sentence from five to seven years after finding that the defendant had brandished a weapon during the commission of the robbery. The defendant argued that the jury had not determined that he brandished a weapon and therefore he was not subject to the higher sentence. *Id*. at ___; 133 S Ct at 2155-2156. The Supreme Court agreed, rejecting the previous distinction it had drawn in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002)—one that distinguished "between facts that increase the statutory maximum and facts that increase only the mandatory minimum." *Alleyne*, 570 US at ___; 133 S Ct at 2155. Instead, the *Alleyne* Court explained that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Id*. at ___; 133 S Ct at 2158. And "a fact is by definition an element of the offense and must be submitted to the jury *if it increases the punishment above what is otherwise legally prescribed*." *Id*. at ___;

133 S Ct at 2158 (emphasis added). This "definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor." *Id*. at ___; 133 S Ct at 2158. The Supreme Court concluded:

> [T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. [*Id*. at ___; 133 S Ct at 2162.]

Apprendi through *Alleyne* represents a line of growth in the Supreme Court's Sixth Amendment jurisprudence concerning the scope of a criminal defendant's right to a jury. This jurisprudence can be summarized as follows: Other than a prior conviction, *any fact* that increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. See *Blakely*, 542 US 296; *Apprendi*, 530 US 466; *Ring*, 536 US 584; *Cunningham*, 549 US 270; *Alleyne*, 570 US ___; 133 S Ct 2151. We proceed by applying this jurisprudence to the sentencing scheme at issue in this case.

IV. APPLICATION

A. MCL 769.25 VIOLATES THE SIXTH AMENDMENT

Our application of the Supreme Court's Sixth Amendment jurisprudence begins with a determination of whether the findings mandated by MCL 769.25

constitute elements of the offense. *Alleyne*, 570 US at ___; 133 S Ct at 2162. To answer that question, we must determine whether the findings "alter[] the legally prescribed punishment so as to aggravate it" and, if so, whether the findings "necessarily form[] a constituent part of a new offense and must be submitted to the jury" and proved beyond a reasonable doubt. *Id*. at ___; 133 S Ct at 2162.

In this case, following the jury's verdict and absent a prosecution motion seeking a life-without-parole sentence followed by additional findings by the trial court, the legally prescribed maximum punishment that defendant faced for her first-degree-murder conviction was imprisonment for a term of years. Specifically, MCL 750.316 provides in relevant part as follows:

> (1) *Except as provided in* . . . MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
>
> (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing. [Emphasis added.]

The phrase "[e]xcept as provided in" means that punishment for first-degree murder is contingent on the provisions of MCL 769.25. As noted, MCL 769.25 contains provisions that establish a default term-of-years prison sentence for a juvenile convicted of first-degree murder. Specifically, the statute provides in pertinent part that "[t]he prosecuting attorney may file a motion under this section to sentence a [juvenile defendant] to imprisonment for life without the possibility of parole if the individual is or was convicted of" first-degree murder. MCL 769.25(2)(b). Absent this motion, "the court *shall sentence the defendant to a term of years*. . . ." MCL 769.25(4) (emphasis added).

The effect of this sentencing scheme clearly establishes a default term-of-years sentence for juvenile defendants convicted of first-degree murder. See *Carp*, 496 Mich at 458 (explaining that "MCL 769.25 now *establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age") (emphasis added);[11] MCL 769.25(4) (providing that, absent the prosecution's motion to impose a sentence of life without parole, "*the court shall sentence the defendant to a term of years* as provided in subsection (9)") (emphasis added).[12]

Stated differently, at the point of conviction, absent a motion by the prosecution and without additional findings on the *Miller* factors, the maximum punishment that a trial court may impose on a juvenile convicted of first-degree murder is a term-of-years prison sentence. See *Blakely*, 542 US at 303-304 (holding that for purposes of *Apprendi*, the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings"). Thus, following her jury conviction, defendant was subject to a term-of-years prison sentence. Once the

[11] Our dissenting colleague erroneously contends that we "conflate" the language in *Carp*. *Post* at 77. To the contrary, Justice MARKMAN, writing for the majority in *Carp*, described MCL 769.25 as follows: "Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now *establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age." *Carp*, 496 Mich at 458 (emphasis added). The dissent fails to articulate what part of this language we "conflate."

[12] MCL 769.25(9) governs a term-of-years sentence for a juvenile defendant, and it requires a sentencing court to impose "a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years."

prosecuting attorney filed a motion to impose a life-without-parole sentence, defendant was exposed to a potentially harsher penalty contingent on findings made by the trial court. This violated defendant's right to " 'a jury determination that [she] is guilty of every element of the crime with which [she] is charged, beyond a reasonable doubt,' " because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 477, 490 (citation omitted).

The Legislature conditioned defendant's life-without-parole sentence on two things: (1) the prosecution's filing of a motion to impose the sentence and (2) the trial court's findings with respect to the *Miller* factors and "any other criteria relevant to its decision . . . ." MCL 769.25(6). This scheme authorized the trial court to enhance defendant's sentence from a term of years to life without parole on the basis of findings made by the court, not a jury. Therefore, the sentencing scheme is akin to the schemes at issue in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. Each of those cases involved a sentencing scheme that authorized a court to enhance a defendant's maximum sentence solely on the basis of judicial fact-finding. The United States Supreme Court found these schemes unconstitutional, explaining, "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge* . . . ." *Cunningham*, 549 US at 281 (emphasis added). Similarly, the sentencing scheme in this case cannot stand when examined under the lens of the Supreme Court's Sixth Amendment jurisprudence.

Clearly, the findings mandated by MCL 769.25(6) "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Apprendi*, 530 US at 494, and therefore act as the "functional equivalent" of elements of a greater offense that must be proved to a jury beyond a reasonable doubt, *Ring*, 536 US at 609. An enhanced punishment under MCL 769.25 is not based merely on defendant's prior convictions, on facts admitted by defendant, or on facts that are part and parcel of the elements that were submitted to the jury during the guilt phase of the proceeding. Rather, like in *Apprendi*, 530 US at 476, in this case the state threatened defendant with certain pains—i.e., a term-of-years sentence—following her jury conviction of first-degree murder and with additional pains—i.e., life without parole—following additional findings by the trial court. "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id*. The effect of MCL 769.25 plainly subjects defendant to harsher punishment on the basis of judicially found facts in contravention of the Sixth Amendment.

We note that MCL 769.25 is unique to Michigan's sentencing scheme, so our Supreme Court's recent decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), while not directly on point, lends support to our conclusion that a defendant's maximum sentence cannot be increased on the basis of judicial fact-finding. In *Lockridge*, our Supreme Court was tasked in relevant part with addressing whether, for purposes of *Alleyne*, "a judge's determination of the appropriate sentencing guidelines range . . . establishes a 'mandatory minimum sentence,' such that the facts used to score the offense variables must be admitted by the defendant or established beyond a

reasonable doubt to the trier of fact . . . ." *People v Lockridge*, 496 Mich 852 (2014). The *Lockridge* Court answered this question in the affirmative, holding that Michigan's sentencing guidelines were constitutionally deficient under *Apprendi* as extended by *Alleyne*. *Lockridge*, 498 Mich at 364. The deficiency was "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*." *Id*.

As a remedy, the *Lockridge* Court severed MCL 769.34(2) "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory" and struck down the requirement in MCL 769.34(3) "that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. Going forward, "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," but "a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and . . . sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id*. at 365.

Lockridge concerned the constitutionality of Michigan's sentencing guidelines—guidelines that govern a defendant's mandatory minimum sentence. Importantly, however, the *Lockridge* Court addressed the constitutionality of the guidelines with the understanding that a defendant's *maximum* sentence is fixed by law and not affected by the guidelines. See *id*. at

377-378 (noting that "scoring the sentencing guidelines and establishing the guidelines minimum sentence range does not alter the maximum sentence"). In contrast, this case concerns the enhancement of a juvenile defendant's *maximum* sentence for first-degree murder under MCL 750.316 and MCL 769.25. An enhanced maximum sentence imposed under this statute is not governed by the sentencing guidelines, but rather is part of a legislative response to the United States Supreme Court's holding in *Miller*. Indeed, this case is unlike any other sentencing case decided in Michigan in that MCL 769.25 is a sui generis exception to the rule in Michigan that apart from the habitual-offender statutes, maximum sentences are fixed by law and cannot be increased on the basis of judicially found facts. See, e.g., *People v McCuller*, 479 Mich 672, 694; 739 NW2d 563 (2007) (noting that apart from the habitual-offender statutes, a criminal defendant's maximum sentence in Michigan is "prescribed by MCL 769.8, which requires a sentencing judge to impose no less than the prescribed statutory maximum sentence as the maximum sentence for every felony conviction") (quotation marks and citation omitted).

That this case does not involve the scoring of sentencing guidelines to fix a mandatory minimum sentence, but rather involves the constitutionality of increasing a maximum sentence, places it squarely within the familiar purview of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. The analysis, therefore, is simple: Apart from a prior conviction or a fact admitted by the defendant, any fact that exposes a defendant to an increased maximum sentence beyond that which is authorized by the jury's verdict standing alone must be submitted to a jury and proved beyond a reasonable doubt. Moreover, in the context of increasing a maxi-

mum sentence using judicially found facts, judicial discretion cannot substitute for a defendant's constitutional right to a jury. See, e.g., *Alleyne*, 570 US at ___; 133 S Ct at 2162 (observing that "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact)"); *Blakely*, 542 US at 305, 305 n 8 (noting that when a court acquires the authority to impose an enhanced sentence "only upon finding some additional fact," "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence" and it is therefore constitutionally deficient).

The prosecution argues that MCL 769.25 does not expose defendant to an increased penalty because "[a]t the time of conviction, [defendant] faced the potential penalty of life without possibility of parole" and the "maximum allowable punishment is—at both the point of conviction and at sentencing—life without the possibility of parole." Similarly, the Attorney General, as amicus curiae, argues: "The statutory maximum penalty for first-degree murder—even for minors—is life without parole. . . . No facts are needed to authorize the sentence, beyond those contained in the jury's verdict." However, if, as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory *default sentence* for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller*. See, e.g., Russell, 56 BC

L Rev at 582 (explaining that under *Miller*, "[t]he default is *not* life without parole" and that "[i]t is only in the rare or unusual case—where a factual finding of irreparable corruption is made—that a juvenile may be exposed to life without parole"). This is why MCL 769.25 creates a default term-of-years sentence for juveniles convicted under MCL 750.316. That is, at the point of conviction the maximum sentence that defendant faced, absent additional findings by the trial court, was a term-of-years sentence. Like in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, defendant's maximum sentence here could only be enhanced following findings made by the court.

Furthermore, the United States Supreme Court rejected a similar argument in *Ring*. In that case, Arizona argued in part that its capital punishment was constitutional because Arizona's first-degree-murder statute specified that "death or life imprisonment" were the only sentencing options. *Ring*, 536 US at 603-604. Therefore, according to Arizona, when the sentencing judge sentenced the defendant to death, he was "sentenced within the range of punishment authorized by the jury verdict." *Id*. at 604. The Supreme Court rejected this argument, explaining that "[t]he Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense . . . ." *Id*. (quotation marks and citation omitted). Instead, the Supreme Court examined the effect of the statute over its form, noting that, "[i]n effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' " *Id*., quoting *Apprendi*, 530 US at 494 (second, third, and fourth alterations in original). Similarly, in this case, MCL 750.316 authorizes a life-without-parole sentence for juveniles "only in a formal sense," and, in effect, the

findings mandated by MCL 769.25(6) subjected defendant to greater punishment than that authorized by the jury's guilty verdict.

The prosecution and the Attorney General attempt to distinguish *Ring* from the present case by arguing that, unlike in *Ring*, which required the sentencing judge to find one of several specified aggravating factors, MCL 769.25 does not mandate the presence of any factor before authorizing a life-without-parole sentence. This is a distinction without any real meaning that was rejected in *Blakely*, wherein the Court explained:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [*Blakely*, 542 US at 305.]

As in *Blakely*, what is critical is that the trial court in this case acquired authority to enhance defendant's sentence from a term of years to life without parole "only upon finding some additional fact." *Id*. In that respect, this case is not distinguishable from *Ring*, *Blakely*, or any of the other United States Supreme Court decisions relative to defendant's Sixth Amendment rights discussed earlier.

The Attorney General also argues that *Ring* is distinguishable because, unlike in *Ring*, in this case the factors in MCL 769.25(6) do not enhance the sentence, but instead act as mitigating factors that can bring the sentence down to a term of years. The Attorney General reads the statute backwards. The term-of-years sentence is the default that can be enhanced on the basis of judicial findings. Thus, under

the statutory configuration, the *Miller* factors are used to seek enhancement of defendant's punishment.

Similarly, the Attorney General argues that neither MCL 769.25 nor *Miller* "requires any fact to be found before a trial court imposes a sentence of life without parole" and, therefore, the life-without-parole sentence was available at the time of conviction. This argument ignores the plain language of the statute and misconstrues *Miller*. Specifically, MCL 769.25(6) provides that upon the prosecution's motion, "the court *shall* conduct a hearing . . . as part of the sentencing process" and "*shall consider the factors* listed in [*Miller*]." (Emphasis added.) By their very nature, the factors enumerated in *Miller* necessitate factual findings. See, e.g., *Gutierrez*, 58 Cal 4th at 1388 (explaining that "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a rare juvenile offender whose crime reflects irreparable corruption") (emphasis added) (quotation marks and citation omitted); Russell, 56 BC L Rev at 581 ("[T]he consideration of mitigation and aggravation under *Miller* is part of making a particular factual determination: is the juvenile irreparably corrupt and incapable of rehabilitation?"). Moreover, "*Miller* concludes that life without parole is an inappropriate sentence for most juveniles, and may be given only in rare circumstances where certain facts are established. Thus, the factual finding of 'irreparable corruption' aggravates—not mitigates—the penalty." Russell, 56 BC L Rev at 582.[13]

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[13] Our dissenting colleague erroneously posits that we "latch[] onto a statement in a law review article" to support the proposition that "irreparable corruption" is an "aggravating factor." *Post* at 76. To the contrary, we do not hold that "irreparable corruption" is an "aggravating factor." Rather, the *Miller* Court held that life imprisonment without parole for juvenile homicide offenders is constitutionally

In addition, as noted, MCL 769.25(7) provides that in imposing the sentence, "the court *shall specify* on the record *the aggravating and mitigating circumstances considered* by the court and the court's reasons supporting the sentence imposed." (Emphasis added.) Thus, the language of the statute necessarily requires the trial court to make findings of fact before imposing a sentence of life without parole.[14]

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permissible only in those rare cases in which a juvenile's crime reflects irreparable corruption. *Miller*, 567 US at ___; 132 S Ct at 2469. The factors provided by the *Miller* Court serve as a guidepost during the sentencing phase to determine if the juvenile's offense reflects irreparable corruption. Absent this determination, life imprisonment without parole violates the Eighth Amendment. Moreover, this is not a maxim derived from a law review article. See, e.g., *Gutierrez*, 58 Cal 4th at 1388 (explaining that "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a ' " rare juvenile offender whose crime reflects irreparable corruption" ' "), quoting *Miller*, 567 US at ___; 132 S Ct at 2469.

[14] The dissent acknowledges that MCL 769.25(7) requires the sentencing court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." However, the dissent states, "But nowhere does the statute require the trial court to make any particular finding of fact before it is authorized to impose a sentence of life without parole." *Post* at 73. The fallacy in this statement, of course, is that it fails to recognize that, in order to consider and specify an aggravating circumstance on the record, a trial court necessarily must first make findings as to the presence and relevance of the aggravating circumstance. Moreover, if the dissent were correct in its contention that MCL 769.25(7) did not require the sentencing court to make any findings of fact, then the statute would offend the Eighth Amendment because, as discussed in detail above, *Miller* requires an individualized factual inquiry before a juvenile may be sentenced to life without parole. Furthermore, the dissent's argument "overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect." *Ring*, 536 US at 604 (quotation marks and citation omitted). In effect, by directing the sentencing court to "consider" the *Miller* factors and specify the aggravating and mitigating circumstances on the record, the statute requires the sentencing court to make findings of fact before imposing the harsher sentence of life without parole.

In a similar argument, the dissent posits that *Miller* "hardly establishes a list of factors that must be met before a sentence of life without parole may be imposed" and states that *Miller* does not "set[] forth any particular facts that must be found before a sentence of life without parole may be imposed." *Post* at 73-74. Instead, according to the dissent, *Miller* "merely require[s] the sentencing court to take into account the individual circumstances of the juvenile offender before determining whether a sentence of life without parole is appropriate in each particular case." *Post* at 74. The dissent concludes that because a sentencing court need only "consider" the *Miller* factors as opposed to make findings on the factors, MCL 769.25 does not violate *Apprendi* and its progeny. Conveniently, the dissent fails to articulate how the court should take into account, without making any findings of fact, a juvenile's immaturity, impetuosity, his or her failure to appreciate risks and consequences, his or her family and home environment, whether the home environment is brutal or dysfunctional, whether the juvenile could extricate herself from the home environment, the circumstances of the offense, the extent of the juvenile's participation in the offense conduct, whether familial and peer pressures may have affected the juvenile, whether the juvenile might have been charged with and convicted of a lesser offense if not for youthful incompetence, whether the juvenile was able to deal with police officers or prosecutors, whether the juvenile was able to assist trial counsel, and, importantly, whether the juvenile exhibits potential for rehabilitation. See *Miller*, 567 US at ___; 132 S Ct at 2468. The dissent's contention that there exists a means by which all these factors must be "considered" without leading to

a single finding of fact defies logic.[15]

In an attempt to bolster its flawed analysis, the dissent focuses on the word "consider" in MCL 769.25(6). Specifically, the statute provides that "[a]t the hearing, the trial court shall *consider* the factors listed in [*Miller*] . . . ." (Emphasis added.) The dissent contends that because the statute directs a court to "consider" the factors as opposed to make findings on the factors, the statute therefore does not require judicial fact-finding to increase a juvenile homicide offender's maximum sentence to life without parole. However, consideration of factors necessarily requires fact-finding, and the terms are often used interchangeably in the law. For example, in the context of child custody proceedings, MCL 722.23 sets forth best-interest factors "to be *considered*, evaluated, and determined" by the trial court, and it is certainly well-settled law that this legislative mandate requires a trial court to make factual findings on these factors. (Emphasis added.) See, e.g., *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993) (noting that in a child custody case, "[t]he trial court must consider each of these [best-interest] factors and explicitly state its *findings* and conclusions regarding each") (emphasis added). Similarly, in deciding whether to award alimony, "trial courts should *consider*" several spousal support factors, *Berger v Berger*, 277 Mich App 700, 726-727; 747 NW2d 336 (2008) (emphasis added), and

[15] In addition, the basic assertion of the dissent is that we reach our conclusions based on what the dissent labels "a false premise." *Post* at 61. Specifically, the dissent contends that our opinion states that "*Apprendi* and its progeny require that *all* facts relating to a sentence must be found by a jury." *Post* at 61-62. However, the dissent fails to cite where that statement is made, we presume because our opinion does not so state, leading, of course, to the inescapable conclusion that it is the dissent whose argument is based entirely on a false premise.

in considering those factors, trial courts should " '*make specific factual findings* regarding the factors that are relevant to the particular case,' " *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010) (emphasis added) (citation omitted). Moreover, in the criminal context, "consideration" of factors implies fact-finding. See, e.g., *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (setting forth factors that a trial court "should *consider*" in determining whether a statement was voluntary) (emphasis added); *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010) (noting that a trial court's factual findings during a voluntariness inquiry are reviewed for clear error).

In short, the dissent's contention that consideration of factors is distinct from making findings about those factors is a difference without any real meaning, illustrates the tenuous nature of the dissent's flawed analysis, and "ignore[s] reality and the actual text of the statute." *Potter v McLeary*, 484 Mich 397, 438; 774 NW2d 1 (2009) (YOUNG, J., concurring in part and dissenting in part).

The prosecution also argues that, unlike in *Cunningham*, 549 US 270, in which findings of certain aggravating factors required the sentencing court to impose an increased sentence, in this case the sentencing court has discretion under MCL 769.25 to impose the harsher sentence. However, merely because the sentencing court has discretion to impose a harsher penalty does not save MCL 769.25 from being unconstitutional because "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 542 US at 305 n 8. Indeed, in *Blakely* the Court rejected the state of Washington's attempt to distinguish *Apprendi* from that state's sen-

tencing scheme on the grounds that sentencing courts had discretion to impose an exceptional sentence. See *Cunningham*, 549 US at 283, citing *Blakely*, 542 US at 305. The *Blakely* Court explained that judicial discretion cannot serve as a substitute for the Sixth Amendment, explaining:

> JUSTICE O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. *But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference* insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely*, 542 US at 308-309 (citation omitted) (emphasis added).]

In this case, based solely on the facts that were decided by the jury, defendant was entitled to a term-of-years sentence. Therefore, because the factual findings required by *Miller* and MCL 769.25(6) were not part and parcel of the elements submitted to the jury, these facts "pertain to whether the defendant has a legal *right* to a lesser sentence," and merely because the sentencing court has discretion to impose the harsher sentence cannot serve as a substitute for defendant's Sixth Amendment right to a jury. *Id*. at 309.

Finally, in an argument that can best be described as a Herculean attempt at linguistic gymnastics, the Attorney General argues that the default term-of-years sentence mandated by MCL 769.25(9) is not actually the default sentence because "[i]f . . . the prosecutor moves for a life sentence, then the term of years is not the default." This argument misconstrues the meaning of the word "default." "Default" is defined in relevant part as "a selection made [usually] automatically or without active consideration due to lack of a viable alternative[.]" *Merriam Webster's Collegiate Dictionary* (11th ed). Under MCL 769.25, a term-of-years sentence is automatic, and there is no alternative absent the prosecution's motion for a life-without-parole sentence and additional findings by the court. Accordingly and as specifically stated in *Carp*, 496 Mich at 458, a term of years is the default sentence.[16]

To summarize, the default sentence for a juvenile convicted of first-degree murder under MCL 750.316 is a term-of-years prison sentence. MCL 769.25 authorizes a trial court to enhance that sentence to life without parole on the basis of factual findings that were not made by a jury but rather were found by the court. In this respect, the statute offends the Sixth Amendment as articulated in *Apprendi* and its progeny. In order to enhance a juvenile's default sentence to life without parole, absent a waiver,[17] a jury must make findings on the *Miller* factors as codified at MCL 769.25(6) to determine beyond a reasonable doubt

[16] Moreover, as already explained, life without parole can never be the default sentence for juveniles under *Graham* and *Miller*.

[17] See *Blakely*, 542 US at 310 (noting that "nothing prevents a defendant from waiving his *Apprendi* rights" and that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding").

whether the juvenile's crime reflects irreparable corruption. Accordingly, because defendant's sentence for first-degree murder was imposed in a manner that violated the Sixth Amendment, she is entitled to resentencing on that offense.[18]

B. SEVERABILITY AND SENTENCING OF JUVENILES GOING FORWARD

Although portions of MCL 769.25 are unconstitutional, this does not necessarily render the statute void in its entirety. Rather, MCL 8.5 provides:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

Indeed, "[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand." *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72; 38 NW2d 77 (1949).

In this case, apart from the provision in Subsection (6) directing the trial court to consider the *Miller*

[18] Given our resolution of this issue, we need not address the other issues defendant raises on appeal. We note that we reject defendant's argument that she should be resentenced in front of a different judge on remand. Although resentencing before a different judge may be "warranted by the circumstances" on some occasions, defendant here has not articulated any circumstances that warrant resentencing before a different judge. *People v Coles*, 417 Mich 523, 536; 339 NW2d 440 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

factors and the provision in Subsection (7) directing the court to articulate aggravating and mitigating circumstances on the record, MCL 769.25 remains operable in the event that the findings on the *Miller* factors are made by a jury beyond a reasonable doubt.[19] That is, following a conviction of first-degree murder and a motion by the prosecuting attorney for a sentence of life without parole, absent defendant's waiver, the court should empanel a jury[20] and hold a sentencing hearing at which the prosecution is tasked with proving that the factors in *Miller* support that the juvenile's offense reflects irreparable corruption beyond a reasonable doubt. During this hearing, both sides must be afforded the opportunity to present relevant evidence, and each victim must be afforded the opportunity to offer testimony in accordance with MCL 769.25(8). Following the close of proofs, the trial court should instruct the jury that it must consider whether, in light of the factors set forth in *Miller* and any other relevant evidence, the defendant's offense reflects irreparable corruption beyond a reasonable doubt sufficient to impose a sentence of life without parole. Alternatively, if the jury decides this question in the negative, then the court should use its discretion

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[19] The Sixth Amendment does not require the jury to articulate mitigating and aggravating circumstances, so Subsection (7) is inoperable.

[20] We note that this hearing may be conducted before the jury that determined the defendant's guilt in the event that the prosecution moves to impose a life-without-parole sentence after the jury verdict but before the jury is dismissed. See, e.g., 18 USC 3593(b) (providing that the sentencing hearing in a federal death-penalty case may be conducted before the jury that determined the defendant's guilt or, in certain circumstances, before a jury empaneled "for the purpose of" the sentencing hearing). Alternatively, the court may empanel a new jury for the purpose of the sentencing hearing in accordance with the court rules governing empaneling a jury for the guilt phase of the proceeding. See MCR 6.410; MCR 6.412.

to sentence the juvenile to a term of years in accordance with MCL 769.25(9).

V. CONCLUSIONS

The Sixth Amendment requires that other than a prior conviction, any fact that increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. See *Apprendi*, 530 US 466; *Ring*, 536 US 584; *Blakely*, 542 US 296; *Cunningham*, 549 US 270; *Alleyne*, 570 US ___; 133 S Ct 2151. The default sentence for juveniles convicted of first-degree murder—i.e. the sentence authorized by the jury verdict—is a term of years. MCL 769.25 authorizes a trial court to increase that sentence to life without the possibility of parole contingent on the trial court's findings with respect to the *Miller* factors and any other relevant criteria. Because MCL 769.25 makes an increase in a juvenile defendant's sentence contingent on factual findings, those findings must be made by a jury beyond a reasonable doubt. Accordingly, in this case, because defendant was denied her right to have a jury make the requisite findings under MCL 769.25, she is entitled to resentencing on her first-degree-murder conviction.

Vacated and remanded for resentencing consistent with this opinion. Jurisdiction is not retained.

HOEKSTRA, P.J., concurred with BORRELLO, J.

SAWYER, J. (*dissenting*). I respectfully dissent.

While the majority sets forth a strong argument, it ultimately fails because it is based on a false premise:

that *Apprendi*[1] and its progeny require that *all* facts relating to a sentence must be found by a jury. Rather, the principle set forth in those cases establishes only that the Sixth Amendment right to a jury trial requires the jury to find those facts necessary to impose a sentence greater than that authorized by the legislature in the statute itself on the basis of the conviction itself. And the statute adopted by the Michigan Legislature with respect to juvenile lifers does not fit within that category.

Looking first to *Apprendi* itself, the defendant was convicted under a New Jersey statute of possession of a firearm for an unlawful purpose and that statute authorized a sentence of between 5 and 10 years in prison.[2] A separate statute, described as a "hate crime" statute, authorized an extended term of imprisonment of between 10 and 20 years if the defendant committed the crime with a purpose to intimidate a person or group because of their membership in a specified protected class.[3] The statute directed that the finding had to be made by the trial judge and the burden of proof was by a preponderance of the evidence.[4]

The *Apprendi* Court found this statutory scheme invalid, concluding as follows: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[5] The majority in the case before us ignores this ultimate conclusion in *Apprendi*, that the

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[1] *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

[2] *Id*. at 468.

[3] *Id*. at 468-469.

[4] *Id*. at 468.

[5] *Id*. at 490.

facts that must be submitted to the jury are those that increase the prescribed maximum sentence.

But facts that the trial court considers in fixing a sentence that is within the maximum authorized by the statute (without additional facts found by the jury) need not be determined by the jury. The *Apprendi* majority distinguished between fact-finding that authorizes a court to impose a greater sentence than the prescribed statutory maximum and a "sentencing factor." It did so in the context of distinguishing *Apprendi* from the earlier decision in *McMillan v Pennsylvania*.[6] *Apprendi*[7] explained the distinction as follows:

> It was in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), that this Court, for the first time, coined the term "sentencing factor" to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge. That case involved a challenge to the State's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. §9712 (1982). According to its provisions, anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" in the course of committing one of the specified felonies. 477 U. S., at 81-82. Articulating for the first time, and then applying, a multifactor set of criteria for determining whether the *Winship*[8] protections applied to bar such a system, we concluded that the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures. 477 U. S., at 86-88.
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> We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *id*.,

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[6] 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

[7] 530 US at 485-487.

[8] *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

at 85-88, and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment," *id*., at 88, may raise serious constitutional concern. As we explained:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U.S.C. §2113(d) (providing separate and greater punishment for bank robberies accomplished through "use of a dangerous weapon or device"), but it does not. *Id*., at 87-88.

As I will discuss later, the statutory scheme created by our Legislature creates these *McMillan*-like sentencing factors rather than requiring particular facts to be found in order for the trial court to have the authority to impose the greater sentence of life without parole.

The Supreme Court has consistently followed this distinction thereafter. In *Ring v Arizona*,[9] it rejected Arizona's death-penalty statute because it placed on the sentencing judge the responsibility of determining the existence of an aggravating factor necessary to impose the death penalty. Without such a judicial determination, the jury's verdict alone only authorized

[9] 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002).

the imposition of life imprisonment.[10] After analyzing the effect of *Apprendi*, the *Ring* Court summarized the law as follows: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[11]

Turning to *Blakely v Washington*,[12] the Court considered a sentencing scheme that authorized the trial court to depart upward from a standard sentence set by statute. The defendant was convicted of kidnapping. Although the Washington statute authorized a maximum sentence of up to 10 years, it further provided that the "standard range" for the defendant's offense was 49 to 53 months.[13] But the statute further authorized a judge to impose a sentence above the standard range if he found "substantial and compelling reasons justifying an exceptional sentence."[14] The sentencing judge had to make findings of fact and conclusions of law that justified the exceptional sentence and those findings were reviewable under a clearly erroneous standard.[15] In rejecting the Washington sentencing scheme, the Court noted "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[16] Thus, a judge's sentencing authority is limited to "the maximum he may impose *without* any addi-

[10] *Id*. at 597.

[11] *Id*. at 602.

[12] 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[13] *Id*. at 299.

[14] *Id*., quoting Wash Rev Code 9.94A.120(2).

[15] *Id*. at 299-300.

[16] *Id*. at 303.

tional findings."[17] The majority attempts to argue that *Blakely* controls this case because "the trial court in this case acquired authority to enhance defendant's sentence from a term of years to life without parole 'only upon finding some additional fact.' "[18] But this attempt fails because MCL 769.25 does not, in fact, require the finding of an additional fact before it authorizes the imposition of a life-without-parole sentence. Indeed, as *Blakely* points out,[19] the question is not whether the sentencing court engages in judicial fact-finding, but on whether the defendant is entitled to a lesser sentence without those facts being found:

> Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Nothing in MCL 769.25 established a legal entitlement to defendant to be sentenced to a term of years rather than life in prison. That is, juvenile offenders who commit first-degree murder, even after the adoption of MCL 769.25, know that they are risking being sentenced to life in prison without the possibility of parole

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[17] *Id*. at 304.

[18] *Ante* at 51, quoting *Blakely*, 542 US at 305.

[19] 542 US at 309.

simply upon the jury's conviction for first-degree murder without the necessity of the jury finding any additional facts regarding the crime.

This then leads to the Court's decision in *Cunningham v California*.[20] In *Cunningham*, the defendant was convicted of sexual abuse of a child under the age of 14. Under California's determinate sentencing law, the crime was punishable by a lower term of 6 years in prison, a middle term of 12 years in prison, or an upper term of 16 years in prison.[21] But the statute required the imposition of the middle term unless the judge found, by a preponderance of the evidence, the existence of one or more aggravating factors. The judge so found and sentenced Cunningham to the upper term.[22] After a review of *Apprendi* and its progeny, the *Cunningham* Court again summarized the basic principle that comes out of those cases: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."[23]

This finally leads to the Supreme Court's decision in *Alleyne v United States*,[24] wherein the Court took up the *Apprendi* principle in the context of increases in a mandatory minimum sentence. Allen Alleyne was convicted under a federal robbery statute and a related statute that required minimum sentences for the possession or use of a firearm in certain crimes. That statute required a minimum sentence of 5 years unless a firearm was brandished, in which case the manda-

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[20] 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007).

[21] *Id*. at 275.

[22] *Id*. at 275-276.

[23] *Id*. at 290.

[24] 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

tory minimum was 7 years, and was further raised to 10 years if the firearm was discharged.[25] The verdict form indicated that Alleyne had used or carried a firearm, which would authorize the mandatory 5-year minimum sentence, but did not indicate whether the firearm was brandished, which would authorize the 7-year mandatory minimum.[26] The trial court found that a preponderance of the evidence supported the finding that Alleyne had brandished the weapon and sentenced him to the mandatory minimum of 7 years in prison.[27] While the *Alleyne* Court concluded that the fact of whether the defendant brandished a firearm must be found by the jury in order to increase the mandatory minimum sentence that he faced,[28] the Court also took pains to note that facts that merely influence judicial discretion in sentencing do not have to be found by a jury, stating as follows:[29]

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g.*, *Dillon* v. *United States*, 560 U. S. [817, 828-829; 130 S Ct 2683; 177 L Ed 2d 271] (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discre-

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[25] *Id*. at ___; 133 S Ct at 2155-2156; see 18 USC 924(c)(1)(A).

[26] *Id*. at ___; 133 S Ct at 2156.

[27] *Id*. at ___; 133 S Ct at 2156.

[28] In doing so, the Court explicitly found that its earlier decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), could not be reconciled with *Apprendi* and also questioned the continued validity of *McMillan* as it applied to mandatory minimum sentences. *Id*. at ___; 133 S Ct at 2157-2158.

[29] *Id*. at ___; 133 S Ct at 2163 (alterations other than those related to citations in original).

> tion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U. S., at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"). This position has firm historical roots as well. As Bishop explained:
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> > [W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. [1] Bishop [Criminal Procedure (2d ed, 1872)] §85, at 54.
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> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, [530 US] at 519, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.

The Michigan Supreme Court recently considered the application of *Alleyne* to the Michigan sentencing guidelines in *People v Lockridge*.[30] While not directly applicable to this case, I do find its analysis relevant. Particularly, the Court makes the following observation in finding the legislative sentencing guidelines to be constitutionally deficient in light of *Alleyne*: "That deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory

[30] 498 Mich 358; 870 NW2d 502 (2015).

minimum' sentence under *Alleyne*."[31] Applying this same principle to the statute before us, the juvenile lifer law does not require any particular judicial fact-finding to increase the potential sentence from a term of years to life without parole. Indeed, as the Court observed, the "inquiry is whether the pertinent facts that must be found are an element of the offense or a mere sentencing factor."[32]

I would submit that, regardless of whether we look to *Apprendi* or *Alleyne*, or any of the other decisions of the United States Supreme Court, the principle to be applied is simple: Does the statutory scheme enacted by the Legislature authorize the sentencing court to impose a particular sentence without any additional fact-finding or, to impose the particular sentence, must an additional fact beyond that which supports the conviction itself be found? If it is the former, the sentencing court is free to impose the sentence that his or her discretion concludes is appropriate. If the latter, then the defendant has the right to have that additional fact found by a jury beyond a reasonable doubt.

Turning to the statute at issue in this case, I believe that it fits within the former category—i.e., that no additional fact-finding is necessary to justify a sentence of life without parole. MCL 769.25 deals with the sentencing of defendants who were under the age of 18 at the time that they committed a crime punishable by a sentence of life without parole and provides in pertinent part as follows:

> (3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after

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[31] *Id*. at 364.

[32] *Id*. at 368-369.

the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

(5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, 576 [sic] US____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

* * *

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60

> years and the minimum term shall be not less than 25 years or more than 40 years.

The majority fundamentally misreads this statute. First, the majority looks to *People v Carp*[33] and its reference to MCL 769.25 establishing a "default sentencing range" for defendants convicted of first-degree murder committed while a juvenile. But the majority downplays the fact that this statement is made in the context of the fact that this "default sentencing range" is only applicable "absent a motion by the prosecutor seeking a sentence of life without parole" and that the trial court may impose a sentence of life without parole after such a motion is filed and conducting a hearing.[34] The majority then performs an act of legalistic legerdemain and reinterprets *Carp* as follows: "Stated differently, at the point of conviction, absent a motion by the prosecution and *without additional findings* on the *Miller*[35] factors, the maximum punishment that a trial court may impose on a juvenile convicted of first-degree murder is a term-of-years prison sentence."[36] If this statement were true, then I would agree with the majority that the question of life without parole must be submitted to the jury. But the statement is simply untrue. There are no additional findings that must be made in order for a defendant to be subjected to a sentence of life without parole.[37]

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[33] 496 Mich 440, 458; 852 NW2d 801 (2014).

[34] *Id*.

[35] *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

[36] *Ante* at 44 (emphasis added).

[37] Arguably, the trial court must "find" that the prosecutor filed a motion within 21 days after conviction, as required by MCL 769.25(3). But I doubt that this is the type of "fact" that the Supreme Court had in mind in determining a defendant's Sixth Amendment rights in *Apprendi* and its progeny.

MCL 769.25(6) does require the trial court to conduct a hearing before it may impose a sentence of life without parole on a juvenile offender. And it further requires that the trial court "consider" the factors listed in *Miller*, as well as any other criteria the trial court deems relevant to its decision. MCL 769.25(7) then requires that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." But nowhere does the statute require the trial court to make any particular finding of fact before it is authorized to impose a sentence of life without parole. Rather, after conducting the hearing and considering the evidence presented at the hearing as well as the evidence presented at trial, the trial court makes its decision and must state on the record the reasons for that decision. As our Supreme Court noted in *Carp*, this process allows for the "individualized sentencing" procedures established by *Miller*.[38] This procedure also presumably allows for more meaningful appellate review of the sentence.

As for *Miller* itself, while MCL 769.25(6) directs the trial court to "consider the factors listed in Miller v Alabama," the opinion itself hardly establishes a list of factors that must be met before a sentence of life without parole may be imposed. Rather, the opinion speaks in general terms about why mandatory life without parole for a juvenile offender violates the Eighth Amendment and what must be considered before imposing a sentence of life without parole. For example, with respect to the former point, the Court[39] states that a mandatory life-without-parole sentence for a juvenile

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[38] *Carp*, 496 Mich at 458-459.

[39] *Miller*, 567 US at ___; 132 S Ct at 2468.

> precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

As for the latter point, the Court directs the sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[40] But neither *Miller* nor the statute sets forth any particular facts that must be found before a sentence of life without parole may be imposed. Rather, both merely require the sentencing court to take into account the individual circumstances of the juvenile offender before determining whether a sentence of life without parole is appropriate in each particular case. But this hardly establishes an "element of the crime" that must be determined by a jury beyond a reasonable doubt.[41]

Moreover, I note that an underlying issue in this case—the trial court's failure to adopt any particular burden of proof because none is set forth in the statute—further supports the conclusion that the statute does not require any particular finding of fact. Rather, I would suggest that the Legislature did not include a burden of proof out of oversight or a desire to leave it to the courts to fashion one, but because it was unnecessary because the statute does not require anything to be proved. Rather, it only requires consideration of the relevant criteria to guide the trial court in

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[40] *Id*. at ___; 132 S Ct at 2469.

[41] *Apprendi*, 530 US at 477.

determining the appropriate individualized sentence for the defendant before it.

The majority perpetuates its mistaken reading of the statute when it states that the "Legislature conditioned defendant's life-without-parole sentence on two things: (1) the prosecution's filing of a motion to impose the sentence and (2) the trial court's findings with respect to the *Miller* factors and 'any other criteria relevant to its decision . . . .' "[42] While the first point is correct—the prosecution must file a motion—the second point, of course, is erroneous. The statute does not require findings, but only that the trial court "consider" the *Miller* "factors" and other relevant criteria. And "consider" does not mean to make findings, but, rather, "to think about carefully" and "to think about in order to arrive at a judgment or decision" and "may suggest giving thought to in order to reach a suitable conclusion, opinion, or decision[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed), pp 265-266.

The majority rejects the argument in the Attorney General's amicus curiae brief that no additional facts are needed to authorize a life-without-parole sentence as follows:[43]

> However, if, as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory *default sentence* for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller*.

But, of course, the statute does not provide for a *mandatory* default sentence of life without parole. And

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[42] *Ante* at 45, quoting MCL 769.25(6).

[43] *Ante* at 49.

it is the mandatory nature of the life-without-parole statutes that offended the Court in *Miller*, resulting in a holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[44] And MCL 769.25 commits no such offense. The majority also latches onto a statement in a law review article by Professor Sarah Russell that "*Miller* concludes that life without parole is an inappropriate sentence for most juveniles, and may be given only in rare circumstances where certain facts are established. Thus, the factual finding of 'irreparable corruption' aggravates—not mitigates—the penalty."[45] But, with all due respect to Professor Russell and the majority, *Miller* hardly establishes "irreparable corruption" as an aggravating factor. Rather, *Miller* uses that term in a quotation from *Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2005), which noted the difficulty in distinguishing between "transient immaturity" and "irreparable corruption."[46] It uses that point to support its statement that "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[47] This hardly establishes "irreparable corruption" as an aggravating factor that must be found in order for the Eighth Amendment to allow the imposition of a life-without-parole sentence on a juvenile offender.

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[44] *Miller*, 567 US at ___; 132 S Ct at 2469.

[45] Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L Rev 553, 582 (2015).

[46] See *Miller*, 567 US at ___; 132 S Ct at 2469.

[47] *Id*. at ___; 132 S Ct at 2469.

Finally, the majority conflates the observation made in *Carp*[48] that MCL 769.25 creates a "default sentence" of a term of years if the prosecutor fails to move for a sentence of life without parole with a requirement that there be additional findings in order to impose a life-without-parole sentence. Indeed, the majority describes the Attorney General's argument that a term-of-years sentence is not the "default sentence" as a "Herculean attempt at linguistic gymnastics."[49] But the only linguistic gymnastics here, Herculean or otherwise, are those of the majority. It attempts to create a "default sentence" under the statute when none exists once the prosecutor has moved for a life sentence. And the majority repeatedly states that the statute requires "additional findings" in order to authorize a sentence of life without parole when no such requirement is established under the statute.

In conclusion, there is no need to empanel a jury to make any additional factual findings to authorize the trial court to impose a sentence of life without parole. Under MCL 769.25, the only factual finding necessary to authorize the trial court to impose a sentence of life without parole was that defendant's involvement in the killing of her father constituted first-degree murder. The jury concluded that it did. Thus, *Apprendi* and the Sixth Amendment are satisfied and the trial court possessed the statutory authority to impose a sentence of life without parole, which it did. In fact, the trial court has done so three times: first, when it was mandatory, then a second time on remand after the decision in *Miller*, and then a third time on remand after the decision in *Carp* and the passage of MCL 769.25. Perhaps the *Lockridge* majority says it best in

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[48] *Carp*, 496 Mich at 458.

[49] *Ante* at 58.

observing that "unrestrained judicial discretion within a broad range is in; legislative constraints on that discretion that increase a sentence (whether minimum or maximum) beyond that authorized by the jury's verdict are out."[50] The majority attempts to find a legislative restraint on the trial court's sentencing discretion where none exists.

For these reasons, I would affirm.

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[50] *Lockridge*, 498 Mich at 375.

ROGERS v WCISEL

Docket No. 318395. Submitted March 11, 2015, at Lansing. Decided August 25, 2015, at 9:00 a.m.

Shana Rogers brought an action in the Family Division of the Otsego Circuit Court seeking child support from David A. Wcisel, who had signed an acknowledgment of parentage when the child was born. Several years later, when a DNA test determined that defendant was not the child's biological father, defendant moved the court to revoke the acknowledgment of parentage under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., relieve him of his child-support obligations, and reimburse him for the child support he had already paid, arguing that the acknowledgment of parentage had been based on a mistake of fact under what was then MCL 722.1437(2)(a), a provision that has since been recodified as MCL 722.1437(4)(a). After a bench trial, the court, Michael K. Cooper, J., denied defendant's motion, ruling that defendant had not established a mistake of fact because there was evidence to indicate that he knew he might not have been the child's father when he signed the acknowledgment of parentage. The court denied defendant's motion for reconsideration or a new trial, his motion to disqualify the trial judge, and his motion to stay the order pending appeal. Defendant appealed.

The Court of Appeals *held*:

1. Unchallenged DNA test results alone were not sufficient to establish a mistake of fact under MCL 722.1437(4). The definition of an "acknowledged father" in MCL 722.1433(1) does not include any reference to a man's being the biological father of a child; and under MCL 722.1003, a man is considered to be the natural father of a child born out of wedlock merely by joining the mother in completing and signing an acknowledgement of parentage before a notary. Biological evidence was a second and separate factor to be considered in the revocation of an acknowledgment of parentage after the trial court finds the moving party's affidavit sufficient under MCL 722.1437(4).

2. The trial court clearly erred by not finding that defendant had established a mistake of fact under MCL 722.1437(4). A mistake of fact for purposes of the RPA is a misunderstanding,

misapprehension, error, fault, or ignorance of a material fact, or a belief that a certain fact existed when in truth and in fact it did not exist. The RPA did not require that a party have no knowledge that a fact might be untrue to create a mistake of fact; instead, it was necessary to show only that the party had acted in part upon an erroneous belief.

Reversed and remanded.

1. PARENT AND CHILD — ACKNOWLEDGMENTS OF PARENTAGE — REVOCATION OF PATERNITY ACT — MISTAKES OF FACT — DNA TEST RESULTS.

Unchallenged DNA test results alone are not sufficient to establish a mistake of fact that would allow a party to bring an action to revoke an acknowledgment of parentage under MCL 722.1437(4)(a); biological evidence is a second and separate factor to be considered in the revocation of an acknowledgment of parentage after the trial court finds the affidavit required under MCL 722.1437(4) to be sufficient.

2. PARENT AND CHILD — ACKNOWLEDGMENTS OF PARENTAGE — REVOCATION OF PATERNITY ACT — MISTAKES OF FACT.

A mistake of fact for purposes of the Revocation of Paternity Act is a misunderstanding, misapprehension, error, fault, or ignorance of a material fact, or a belief that a certain fact existed when in truth and in fact it did not exist; the Revocation of Paternity Act does not require that a party have no knowledge that a fact might be untrue to create a mistake of fact but requires only that the party acted in part upon an erroneous belief (MCL 722.1437(4)(a)).

Michael T. Edwards for defendant.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

STEPHENS, J. Defendant appeals by delayed leave granted the circuit court order denying his motion to revoke his acknowledgment of parentage. We reverse and remand.

I. BACKGROUND

Plaintiff, Shana J. Rogers, and defendant, David A. Wcisel, began an "off and on" dating relationship in

2006. On March 12, 2007, plaintiff gave birth to MW. Defendant was present for the delivery of MW and signed an acknowledgment of parentage at the hospital.[1] Plaintiff and defendant continued to reside together for approximately one year after MW's birth before they separated and defendant left the residence. On July 3, 2008, plaintiff, through the Otsego County Prosecutor's Office, filed a complaint for child support against defendant. Defendant filed an answer that admitted to allegations that he was the father of MW, that he was not living with the child, that the child was receiving public assistance, and that he was "of sufficient ability to provide support for the child[] and [had] failed to provide support." As a result, the parties signed a consent order on August 19, 2008, granting plaintiff sole legal and physical custody of MW, requiring defendant to pay $2,670 toward plaintiff's reasonable and necessary confinement expenses, and requiring defendant to pay $442 a month in child support.

Sometime later defendant began to notice that MW had "physical attributions" that were not his and asked plaintiff for a DNA test. The DNA test results showed that there was a zero percent chance that defendant was MW's biological father. Thereafter, on July 15, 2012, defendant filed a motion requesting that the trial court revoke the parties' acknowledgment of parentage, relieve him of any child support obligations, and reimburse him for the child support expenses he had previously paid. Along with his motion, defendant attached the DNA test and an affidavit in which he

[1] This Court was not provided with a copy of the acknowledgment of parentage and the document is not a part of the trial court record. For purposes of this opinion, the Court has assumed that the document was duly signed and notarized and was properly executed and filed in keeping with the requirements of §§ 3 and 5 of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*.

averred that he signed the acknowledgment of parentage because plaintiff represented that he was the only possible father and because he believed that to be true. Plaintiff filed an answer and brief in opposition to defendant's motion. Plaintiff asserted that she informed defendant that there was a possibility that another man was the father, and that defendant merely "changed his mind" about being MW's legal father. Plaintiff requested that the trial court require defendant to post $2,000 in bond to be paid to plaintiff if his motion was denied and hold him in contempt for committing perjury in his affidavit. On August 20, 2012, the trial court ordered "[t]hat the Friend of the Court shall hold all child support received on behalf of Defendant until further order of the Court."

On October 5, 2012, at the hearing on defendant's motion, defendant argued that his affidavit and the DNA test results were sufficient to set aside the acknowledgment of parentage. Plaintiff countered that the trial court could apply the equitable parent doctrine and require defendant to continue supporting the child. The trial court accepted that the acknowledgment of parentage was not correct, and plaintiff agreed that the DNA test proved defendant was not MW's biological father. The court, however, would not revoke the acknowledgment of parentage, ruling that defendant had not stated facts that constituted a mistake of fact, newly discovered evidence, fraud, misrepresentation, or duress under MCL 722.1437(2).[2] The court explained that after complying with this provision, defendant needed to show that revoking the acknowledgment would not be against MW's best interests. To address these contested issues, a bench trial was held on November 29, 2012.

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[2] This provision has since been recodified as MCL 722.1437(4). See 2014 PA 368.

At trial defendant testified that after he and plaintiff broke up, she informed him that she was pregnant. Defendant believed he was the child's biological father. He stated that he was not aware that plaintiff had sexual relations with another man, and that plaintiff never indicated that he might not be the child's father. Defendant testified that he would not have signed an acknowledgment of parentage if he knew that he was not the child's father. For comparison, defendant testified about a prior child born to plaintiff in 2006 who plaintiff "swore 100 percent" was his. Defendant was present for that child's delivery and was asked to sign the acknowledgment of parentage for that child, but refused because he knew that child could not have been his. Defendant explained that when he asked plaintiff for a DNA test for MW, plaintiff took the position that he was the father. Defendant testified that when he texted plaintiff the results, which indicated that he was not MW's biological father, plaintiff responded that she was "in shock," "sorry," and "always thought that [MW] was [his]." Defendant read texts from plaintiff into the record in which plaintiff agreed that defendant should be removed from MW's birth certificate and stop paying child support. He testified that plaintiff sent him a text message that said, " 'You said she was yours no matter what. That's what hurts the most.' "

Plaintiff testified that she became pregnant at the "end of June, beginning of July" of 2006, and that around that time she had sexual relations with defendant and Justin Beacroft. She testified that she called defendant to "let him know [she] was pregnant [and] that there could be a 50/50 chance" that he was not the child's biological father. She testified that defendant and Beacroft even joked about not knowing which one of them was the father while they were drinking at a

golf course before the child was born. Defendant denied both allegations. Plaintiff testified that the child's due date was changed during her pregnancy and that when she told defendant about this "he looked at me with a dumb look on his face like knowing that it probably wasn't his . . . ." However, plaintiff testified that she thought the child would be defendant's based on the new due date. Plaintiff testified that after MW was born, she and defendant only talked about the possibility of her not being his when defendant heard rumors from others in town. When asked what she meant when she texted defendant, "I'm so sorry for everything. I truly did believe she was yours," plaintiff answered, "Truly hoped that it was his. I probably worded it wrong in how I spelt it and worded it. Like I truly did believe it was his and truly hoped that it was his when the DNA test came back." She admitted during cross-examination that she was surprised by the DNA test results.

Beacroft testified that he lived with defendant and plaintiff in 2006, and that he and plaintiff had sexual relations during that time. He testified that in October or November 2006, he told defendant "that things had been going on between" him and plaintiff. Defendant testified that it was in the summer of "2009, 2008" that Beacroft told him that he had sexual relations with plaintiff but that Beacroft did not specify when this occurred. Beacroft testified that plaintiff called him when she found out that she was pregnant and explained that she was not sure if it was defendant's or his. Beacroft testified that it was his understanding that defendant was MW's biological father.

Jami Rogers, plaintiff's mother, testified that plaintiff told her "a month-and-a-half before [the child] was born that defendant might not be the father." Rogers

testified that while plaintiff was in labor, she and defendant talked and defendant stated "that he didn't think that he was going to be able to go through with this" and that "he didn't know if he could handle the situation." Defendant explained that his statements were in reference to the delivery because he was afraid that he would pass out. Defendant denied ever indicating to plaintiff's mother that he thought the child might not be his.

The court denied defendant's motion on the record at the end of the trial. The trial court believed that defendant's lack of contact with MW after defendant and plaintiff separated "indicat[ed] that [defendant] had some knowledge that perhaps he wasn't the father." The court found the testimony of plaintiff, Beacroft, and plaintiff's mother to be more credible and indicated that defendant had doubts as to whether he was MW's father. The trial court found "most persuasive" plaintiff's testimony that defendant said "no matter what, she's mine" which indicated to the court that "there was a question out there as to paternity." Accordingly, the trial court concluded that plaintiff's "version of events [was] more believable" and found that defendant had not met his burden in proving a mistake of fact.

On January 25, 2013, defendant filed a motion for a new trial or reconsideration under MCR 2.611(A)(1)(a), (e), and (g) and MCR 2.612(C)(1)(f); a motion to disqualify the trial judge under MCR 2.003(C)(1)(a) and (b); and a motion to stay the order pending appeal under MCR 2.614. After hearing oral argument and allowing the parties to submit briefs regarding the application of the holding in *Bay Co Prosecutor v Nugent*, 276 Mich App 183; 740 NW2d 678 (2007), that the presentation of unchallenged DNA evidence is sufficient to

establish a mistake of fact, the trial court denied defendant's motion for a new trial and for disqualification.

II. REVOCATION OF ACKNOWLEDGMENT OF PARENTAGE

Defendant argues that the trial court erred by denying his motion to revoke his acknowledgment of parentage when he set forth sufficient facts to demonstrate a mistake of fact. We agree.

This case arises under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*.[3] "When reviewing a decision related to the Revocation of Paternity Act, this Court reviews the trial court's factual findings, if any, for clear error." *Glaubius v Glaubius*, 306 Mich App 157, 164; 855 NW2d 221 (2014). " 'The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake.' " *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014) (citation omitted). The proper interpretation and application of a statute is a question of law, which this Court reviews de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

The principles of statutory interpretation are well established. *Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011). The goal of statutory interpretation is to give effect to the Legislature's intent. *Bay Co Prosecutor*, 276 Mich App at 187. If a statute's language is clear, this Court assumes that the Legislature intended its plain meaning and enforces it accordingly. *Id*. In doing so, "every word should be given meaning, and we should avoid a construction

[3] The version in effect at the time of the deciding of this case was 2012 PA 159. All references to the statute in this case are to the applicable 2012 version. The statute has since been amended by 2014 PA 368.

that would render any part of the statute surplusage or nugatory." *Id*. (citations and quotation marks omitted). "While generally words and phrases used in a statute should be assigned their primary and generally understood meaning, words and phrases which have a technical or special meaning in the law should be construed according to that technical or special meaning[.]" *Mich Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 631; 455 NW2d 352 (1990) (citation and quotation marks omitted). Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results. *Draprop Corp v City of Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001); *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

"[I]n order to revoke an acknowledgment of parentage, an individual must file a claim as provided under the [RPA]." MCL 722.1007(h). MCL 722.1437 governs an action for the revocation of an acknowledgment of parentage. MCL 722.1437(1) of the RPA provides that "[t]he mother, the acknowledged father, an alleged father, or a prosecuting attorney" may file an action for the revocation of an acknowledgment of parentage within three years after the child's birth or within one year after the acknowledgment of parentage is signed, whichever is later. These timing requirements, however, do not apply to actions "filed on or before 1 year after the effective date of this act," which was June 12, 2012. MCL 722.1437(1).[4] Defendant filed his motion to revoke the acknowledgment of parentage on July 15, 2012.

MCL 722.1437(2)[5] provides:

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[4] This provision has since been amended. 2014 PA 368.

[5] As of March 17, 2015, this section will be at MCL 722.1437(4). 2014 PA 368.

> An action for revocation under this section shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.

Once a court determines that the affidavit is sufficient, the court is then required to "order blood or tissue typing or DNA identification" under MCL 722.1443. MCL 722.1437(3). "The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child." MCL 722.1437(3). An "acknowledged father" is "a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the acknowledgment of parentage act[.]" MCL 722.1433(a). In order to have prevailed in having the acknowledgment of parentage revoked the defendant must have submitted (1) a signed affidavit containing facts sufficient, in this case, to make up a claim of mistake of fact; and (2) the results from blood, tissue, or DNA testing. MCL 722.1437(3). This evidence, taken together, must have clearly and convincingly proved that defendant was not the father of the child. MCL 722.1437(3).

In this case, the court received the DNA test results at the same time it received defendant's affidavit. Neither plaintiff nor the trial court refuted the validity of the DNA results. The bench trial was held to test the sufficiency of the affidavit. Both the trial court's oral opinion after trial and its written opinion on reconsid-

eration denied defendant relief for failure to establish a mistake of fact.[6] In its oral opinion, the trial court stated that the testimonial evidence presented at trial established that defendant "had some knowledge that perhaps he wasn't the father." The court relied on several items of proof in reaching its conclusion. The court first highlighted the fact that defendant was not involved in MW's life after his relationship with plaintiff ended. The court also credited the statements attributed to defendant by his mother and plaintiff. Defendant's mother testified that defendant said, "I can't go through with this." Plaintiff testified that defendant said, "no matter what, she's mine," and that defendant did not seek a DNA test earlier because he said he "didn't want to know then." In its opinion on defendant's motion for reconsideration, the court ruled that "DNA test results could not create a mistake of fact where Defendant was already doubtful of his biological fatherhood status."

Our Supreme Court has held "that the parties' knowledge of the possibility that respondent was not the biological father of the child" is insufficient to demonstrate fraud or misrepresentation.[7] However, we do not have the same clarity for the instance of mistake of fact.

In the case of *Bay Co Prosecutor*, 276 Mich App at 189, a panel of this Court concluded that the trial court erred by holding that the plaintiff had failed to establish a mistake of fact. *Bay Co Prosecutor* was decided under MCL 722.1011, which governed revoca-

[6] The trial court explained that because it did not find a mistake of fact, there was no need to consider the equities of the case that would include how the child's best interests would be affected by revocation of the acknowledgment.

[7] *In re Moiles*, 495 Mich 944, 945 (2014).

tions of paternity until it was repealed and replaced by MCL 722.1437. *Id*.; 2012 PA 159; 2012 PA 161. In that case, the defendant, despite having had a vasectomy years earlier, believed that he had fathered a woman's child.[8] *Id*. at 185. Based on that belief, the defendant signed an acknowledgment of parentage. Months later it was learned that defendant's fourteen-year-old son, not defendant, impregnated the woman. *Id*. The Bay County prosecutor filed a complaint to revoke the defendant's acknowledgment of parentage. *Id*. at 185-186. The trial court held that "[b]ecause defendant intended to be the child's father when he signed the affidavit of parentage, and because he intended to remain as the father after he learned that he was not the biological father, there was no mistake of fact that would justify revocation of defendant's acknowledgment of parentage." *Id*. at 186-187. A panel of this Court reversed, reasoning:

> Plaintiff established that when defendant signed the affidavit of parentage, defendant believed that he was the biological father of the child. Plaintiff also established that a DNA test later determined that defendant's son, and not defendant, was the biological father. Presentation of the unchallenged DNA evidence was sufficient to establish a mistake of fact. See *Sinicropi* [*v Mazurek*, 273 Mich App 149, 176 n 14; 729 NW2d 256 (2006)]. Regardless of whether defendant intended to be the father when he signed the affidavit of parentage, and whether he intended to remain the legal father after he learned that he was not the child's biological father, the evidence established that defendant's decision to acknowledge paternity in this case was based, at least in part, on a mistaken belief that he

[8] The defendant's belief that he could have fathered a child after a vasectomy was based on defendant's prior girlfriend also having claimed that he impregnated her after his vasectomy before she miscarried.

> was, in fact, the biological father. [*Bay Co Prosecutor*, 276 Mich App at 190.]

In *Bay Co Prosecutor*, the Court found the defendant's belief that he was the biological father at the time of signing the acknowledgment of parentage as well as the unchallenged DNA evidence to be sufficient to establish a mistake of fact, and that defendant's intention to be and remain the child's father regardless of biology irrelevant.

In *Sinicropi*, 273 Mich App at 176 n 14, a panel of this Court affirmed the trial court's finding of a mistake of fact. *Sinicropi* was also decided under MCL 722.1011, the predecessor statute to MCL 722.1437. *Id*. at 176. In *Sinicropi*, Holly Mazurek had dated Martin Powers, then briefly dated Gregory Sinicropi, and then resumed her relationship with Powers. *Id*. at 153. During Mazurek's brief relationship with Sinicropi, a child was conceived. Powers believed that he fathered the child and signed the acknowledgment of parentage. Powers and Mazurek again separated and in 2004 were involved in a custody dispute over the child. It was during that time that DNA testing revealed that Sinicropi was the child's biological father. *Id*. at 153-154. The trial court denied Mazurek's request to revoke Powers's acknowledgment of parentage, granted Powers physical custody, determined that granting custody to Sinicropi would not be in the child's best interests, and ordered Mazurek and Sinicropi to pay child support to Powers. *Id*. at 153-155. On appeal, a panel of this Court remanded the case to the trial court for a consideration of the equities of the case. *Id*. at 175-176. The Court did note, however, that on remand "[t]here [was] no need to review whether there was a mistake of fact regarding paternity or whether there [was] clear and convincing evi-

dence that Powers [was] not the biological father given the unchallenged DNA evidence and the parties' agreement that Sinicropi fathered the child." *Id*. at 176 n 14. In *Sinicropi*, the Court found the unchallenged DNA evidence and the fact that no one disputed Sinicropi was the child's biological father to be sufficient evidence to establish a mistake of fact.

In the case of *Helton v Beaman*, 304 Mich App 97, 105; 850 NW2d 515 (2014), affirmed in result 497 Mich 1001 (2015), a panel of this Court, under the same version of the RPA at issue here, concluded that a mistake of fact existed as required to proceed with revocation of an acknowledgment of parentage. *Id*. at 105 (opinion by O'CONNELL, J.), 119 (opinion by K. F. KELLY, J.), and 136 (opinion by SAWYER, J.). In *Helton*, the defendants, Lisa and Douglas Beaman, were in a relationship for several years. *Id*. at 100. During a brief separation in the fall of 2002, Lisa had sexual relations with the plaintiff, Matthew Helton. Lisa gave birth to a child in June 2003, before she and Douglas were married. They both signed an acknowledgment of parentage at the hospital naming Douglas as the child's father. *Id*. Although the Beamans raised the child as part of their family, they allowed Helton to interact with the child "periodically." *Id*. at 101. When the child was two months of age, Helton requested a DNA test and the Beamans agreed. Because Helton initially failed to pay for the DNA test, the test results, which confirmed that Helton was the child's biological father, were not obtained until 2006. Four years later, Helton filed a complaint seeking an order of filiation and parenting time, but it was dismissed by stipulation. Approximately two years after that, Helton brought suit under the RPA and requested summary disposition in his favor based solely on the DNA test results. *Id*. The trial court denied Helton's motion for

summary disposition because "the DNA results standing alone were insufficient to establish by clear and convincing evidence that defendants' acknowledgment of parentage should be set aside." *Id*. at 102. The trial court then held a bench trial and, after finding Lisa's testimony more credible than Helton's, concluded that it was in the child's best interests to deny Helton's request to revoke the Beamans' acknowledgment of parentage. *Id*. The trial court specifically acknowledged the fact that Helton had no parental relationship with the child. *Id*.

On appeal, this Court concluded that

> Helton's assertion of mistake of fact is a sufficient basis to proceed with the revocation action. The DNA evidence supports Helton's attestation that he is the child's biological father, and the trial testimony indicates that defendants mistakenly believed that Douglas was the child's biological father. When a defendant's decision to sign an affidavit of parentage was based in part on a mistaken belief that he is the child's biological father, that mistaken belief constitutes a mistake of fact sufficient to proceed with a revocation action. [*Id*. at 105 (opinion by O'CONNELL, J.); see also *id*. at 119 (opinion by K. F. KELLY, J.) and 136 (opinion by SAWYER, J.).]

In *Helton*, the Court found the DNA evidence and Douglas' mistaken belief that he was the father at the time of signing the acknowledgment to be sufficient evidence to establish a mistake of fact.[9]

Defendant heavily relies on *Bay Co Prosecutor* and *Sinicropi* to contend that his unchallenged DNA test results alone are sufficient to establish a mistake

[9] The Supreme Court granted leave to appeal and affirmed the result and portions of the reasoning with respect to whether the trial court was required to determine the best interest of the child. The discussions regarding mistakes of fact were not addressed. *Helton*, 497 Mich at 1001.

of fact. We decline to adopt defendant's position that unchallenged DNA evidence alone is sufficient to establish a mistake of fact under the RPA. The holdings in *Bay Co Prosecutor* and *Sinicropi* each required something in addition to DNA evidence to find a mistake of fact. In *Bay Co Prosecutor*, the Court found that the additional fact that defendant had some belief that he was the biological father at the time of signing the acknowledgment of parentage created the mistake of fact. It is noteworthy that the defendant in *Bay Co Prosecutor* had a scientific reason to doubt his biological connection but still had some thought or, perhaps, hope that he was the biological parent. See *Bay Co Prosecutor*, 276 Mich App at 190. In *Sinicropi*, the Court relied on the parties' agreement after the fact that plaintiff fathered the child to support the mistake of fact. *Sinicropi*, 273 Mich App at 176 n 14. In *Helton*, Douglas, like the defendant in *Bay Co Prosecutor*, held the mistaken belief that he was the biological father at the time he signed the acknowledgment. *Helton*, 304 Mich App at 105.

Simply put, biology does not control either an acknowledgment of parentage or its revocation. Our Supreme Court has held that "an acknowledging father is not required to attest that he is the biological father."[10] The definition of an "acknowledged father" does not include any reference to a man being the biological father of a child. MCL 722.1433(1). A man is considered to be the natural father of a child born out of wedlock merely by joining the mother in completing and signing an acknowledgment of parentage before a notary. MCL 722.1003(1), (2). The undisputed fact that a man is not a child's biological father, as proven by clear and convincing evidence through blood, tissue, or

[10] *In re Moiles*, 495 Mich at 945.

DNA, does not establish a mistake of fact. Biological evidence is rather a second and separate factor to be considered in the revocation of an acknowledgment of parentage after the trial court finds the moving party's affidavit sufficient under MCL 722.1437(2).[11]

There is no definition of "mistake of fact" in the RPA or the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*. However, the Legislature is presumed to be aware of existing law when drafting new laws. *AFSCME v Detroit*, 267 Mich App 255, 269; 704 NW2d 712 (2005). Because there is no indication in the language of the RPA that the Legislature intended to alter the meaning of the term "mistake of fact" as understood in our law, it is appropriate to look to the definition used in other cases. In *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951), a mistake of fact was defined as "a misunderstanding, misapprehension, error, fault, or ignorance of a material fact, a belief that a certain fact exists when in truth and in fact it does not exist." Since *Montgomery Ward* was decided in 1951, this Court has consistently cited the same definition. See *Sentry Ins v ClaimsCo Int'l, Inc*, 239 Mich App 443, 447; 608 NW2d 519 (2000); *Bay Co Prosecutor*, 276 Mich App at 189-190; *In re Luin Gyle Atterberry Revocable Trust*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 307850); and *Zigmond Chiropractic, PC v AAA Mich*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2013 (Docket Nos. 300643, 304756, 305662, 305741, 306048, 306455, and 306790).

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[11] See *Helton*, 304 Mich App at 103 n 4 (opinion by O'CONNELL, J.) ("We address the affidavit because a determination of the sufficiency of the affidavit is a requisite step in the analysis prescribed by MCL 722.1437.").

Applying the definition from *Montgomery Ward*, we conclude that the trial court committed clear error by not finding that defendant had established a mistake of fact. A mistake of fact is "a belief that a certain fact exists when in truth and in fact it does not exist." *Montgomery Ward*, 330 Mich at 279. The trial court found that defendant had doubt about whether he was the biological father when he signed the acknowledgment of parentage and that, therefore, proofs on mistake of fact failed. The law, however, does not require that a party have no knowledge that a fact might be untrue to create a mistake of fact. Instead, the party must act in part upon an erroneous belief. The trial court specifically rejected the idea that a mistake of fact could be found when a belief was only partial or when doubt about that belief was suspect. However, *Helton* and *Bay Co Prosecutor* are inapposite.

We conclude that evidence that a party acted in part on an erroneous belief is sufficient under MCL 722.1437(2) to establish a mistake of fact. Accordingly, we reverse the trial court's order denying defendant's motion to revoke his acknowledgment of parentage and remand this matter to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

WILDER, P.J., and SERVITTO, J., concurred with STEPHENS, J.

DOE v DEPARTMENT OF CORRECTIONS

Docket Nos. 321013 and 321756. Submitted June 3, 2015, at Lansing. Decided August 25, 2015, at 9:05 a.m. Leave to appeal sought.

Seven men who had been incarcerated in adult prisons as juveniles, each identified as John Doe, brought an action in the Washtenaw Circuit Court against the Department of Corrections, the Governor, and others, claiming that they had been subjected to sexual violence and harassment by adult male prisoners and female prison guards in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, which prohibits discrimination in public services. Defendants moved for summary disposition, arguing that plaintiffs had failed to comply with MCL 600.5307(2), a provision of the prison litigation reform act (PLRA), MCL 600.5501 *et seq*., which requires a prisoner bringing a civil action concerning prison conditions to disclose the number of civil actions and appeals that the prisoner previously initiated. Defendants also argued that plaintiffs had failed to state a claim on which relief could be granted under MCR 2.116(C)(8) because the ELCRA had been amended in 1999 to exclude prisons from the definition of "public service" for purposes of the act. The court, Carol Kuhnke, J., denied defendants' motion, ruling that the disclosure requirements in MCL 600.5507 applied only to indigent prisoners and, in a separate order, that the statutory provision excluding prisons as a public service under ELCRA, MCL 37.2301(b), was an unconstitutional violation of prisoners' right to equal protection of the law. Defendants sought leave to appeal the PLRA order in Docket No. 321013 and the ELCRA order in Docket No. 321756. The Court of Appeals denied the applications, and the Supreme Court, in lieu of granting leave to appeal, remanded to the Court of Appeals for consideration as on leave granted. 497 Mich 881 (2014).

The Court of Appeals *held*:

1. In Docket No. 321013, the trial court erred by denying defendants' motion for summary disposition because plaintiffs failed to comply with the requirement in MCL 600.5507(2) that a prisoner who brings a civil action concerning prison conditions must disclose the number of civil actions and appeals that the

prisoner has previously initiated. MCL 600.5507(3) provides that the court must dismiss the action if it finds that the prisoner failed to comply with the disclosure requirements of subsection (2). Although the complaint indicated that two other civil actions between these parties arising out of the events alleged in the complaint had been filed, this disclosure was ambiguous regarding the identities of the parties and did not indicate whether those were the only civil actions that plaintiffs had initiated. Further, although MCL 600.5507(1) pertains to the limitation for when a prisoner may claim indigency in a civil action, there is no language in MCL 600.5507(2) or MCL 600.5507(3) limiting their requirements to prisoners who are indigent. Under MCL 8.4b, the fact that the provision's catch line makes reference to indigency cannot be used to construe the section more broadly or narrowly than the text would indicate. Contrary to plaintiffs' argument, MCL 600.5507(2) is not the mechanism for determining whether a prisoner has brought three or more civil actions that have been dismissed as frivolous, thereby preventing them from claiming indigency under MCL 600.5507(1), because that determination is made according to the procedure set forth in MCL 600.5529. Neither the statute's legislative history nor the absurd-results rule compels a different conclusion. Because MCL 600.5507(3) states that a court shall dismiss a civil action if a prisoner failed to comply with MCL 600.5507(2), plaintiffs were not entitled to amend their complaint.

2. In Docket No. 321756, the trial court erred by denying defendants' motion for summary disposition regarding plaintiffs' claims under the ELCRA. MCL 37.2302(a) provides that except where permitted by law, a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. However, 1999 PA 202 amended the definition of "public service" to indicate that it does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment. This provision bars plaintiffs' claim. Although a federal district court opinion ruled that this exclusion was an unconstitutional violation of equal protection under the law, that opinion was not binding, did not render the provision void *ab initio*, and did not preclude defendants by collateral estoppel from arguing that 1999 PA 202 was constitutional. The amendment was not facially unconstitutional as violative of equal protection because prisoners are not a suspect class, the amendment does not infringe a protected fundamental right, prisoners and nonprisoners are not

similarly situated, and the amendment was rationally related to the legitimate governmental interest of deterring meritless lawsuits and preserving scarce public resources.

Reversed and remanded for further proceedings.

Judge BECKERING, concurring in part and dissenting in part, concurred with regard to the issue of whether dismissal was required under MCL 600.5507(3) because of binding existing precedent interpreting the PLRA, but respectfully dissented in all other respects. She would have allowed plaintiffs to file an amended complaint in compliance with MCL 600.5507(2) had she not been bound by precedent. She would have affirmed the trial court's declaration that the 1999 amendment of the ELCRA was unconstitutional on the alternative ground that the statutory amendment contravened the clear and express directive given to the Legislature in Const 1963, art 1, § 2 to protect the civil rights of all persons. She would also have held that the amendment was unconstitutional because it failed the rational-basis test. Finally, she would have held that plaintiffs pleaded sufficient claims to survive a motion for summary disposition under MCR 2.116(C)(8).

1. PRISONS AND PRISONERS — CIVIL ACTIONS — DISCLOSURE OF PRIOR CIVIL ACTIONS AND APPEALS — INDIGENCY.

The requirement in MCL 600.5507(2) that a prisoner who brings a civil action concerning prison conditions must disclose the number of civil actions and appeals that the prisoner has previously initiated is not limited to prisoners who are indigent.

2. PRISONS AND PRISONERS — CIVIL ACTIONS — DISCLOSURE OF PRIOR CIVIL ACTIONS AND APPEALS — DISMISSALS — REMEDIES.

MCL 600.5507(3) requires a court to dismiss a civil action brought by a prisoner concerning prison conditions if the prisoner failed to disclose under MCL 600.5507(2) the number of civil actions and appeals that the prisoner has previously initiated; a prisoner who fails to do so is not entitled to amend his or her complaint to comply with MCL 600.5507(2).

3. CONSTITUTIONAL LAW — EQUAL PROTECTION — PRISONS AND PRISONERS — CIVIL RIGHTS ACT — DEFINITIONS — PUBLIC SERVICE.

The amendment of the definition of "public service" in Michigan's Civil Rights Act, MCL 37.2101 *et seq*., to exclude a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment was not facially unconstitutional as violative of the right to equal protection (US Const, Am XIV; Const 1963, art 1, § 2; 1999 PA 202).

Deborah LaBelle, *Anlyn Addis*, *Richard A. Soble*, *Jennifer B. Salvatore*, *Nakisha Chaney*, *Edward Macey*, *Michael L. Pitt*, *Peggy Goldberg Pitt*, and *Cary S. McGehee* for plaintiffs in Docket No. 321013.

Pitt McGehee Palmer & Rivers, PC (by *Michael L. Pitt*, *Beth M. Rivers*, *Peggy Goldberg Pitt*, and *Cary S. McGehee*), *Deborah LaBelle* and *Anlyn Addis*, and *Jennifer B. Salvatore*, *Nakisha Chaney*, and *Edward Macey* for plaintiffs in Docket No. 321756.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Ann Sherman*, Assistant Solicitor General, and *Mark E. Donnelly*, *Michael F. Murphy*, *Christina M. Grossi*, and *Heather S. Meingast*, Assistant Attorneys General, for defendants in Docket No. 321013.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Mark E. Donnelly* and *Heather S. Meingast*, Assistant Attorneys General, for defendants in Docket No. 321756.

Before: RIORDAN, P.J., and DONOFRIO and BECKERING, JJ.

RIORDAN, P.J. Defendants, various governmental entities and individuals including the Department of Corrections and the Governor, originally sought leave to appeal the trial court orders denying their motions for summary disposition in this action initiated by plaintiffs, who are male prisoners.

In Docket No. 321013, defendants sought to appeal the trial court order denying their motion for summary

disposition based on plaintiffs' failure to comply with the prison litigation reform act (PLRA), MCL 600.5501 *et seq*. In Docket No. 321756, defendants sought to appeal the trial court order denying their motion for summary disposition based on the prisoners' substantive discrimination claims.

This Court initially denied defendants' applications for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Doe v Dep't of Corrections*, 497 Mich 881 (2014). Having reviewed the issues raised on appeal, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

Plaintiffs are seven unidentified males who became imprisoned while under the age of 18 in Department of Corrections (DOC) facilities. Plaintiffs sued under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., claiming that they had been subjected to sexual violence and harassment by adult male prisoners and female prison guards.

Defendants eventually moved for summary disposition on several grounds. First, they contended that plaintiffs failed to comply with MCL 600.5507(2), a provision of the PLRA requiring that a prisoner filing a lawsuit concerning prison conditions disclose the number of civil actions and appeals the prisoner previously initiated. Defendants alleged that plaintiffs' disclosure was insufficient. Defendants further argued that, because MCL 600.5507(3) provides that a court "shall" dismiss any action if the prisoner fails to comply with Subsection (2), plaintiffs' complaint had to be dismissed without prejudice. MCR 2.116(C)(4). Plaintiffs countered that MCL 600.5507 only applied to complaints

filed on behalf of indigent prisoners, which did not include the prisoners in this case. The trial court ultimately denied defendants' motion for summary disposition.

Defendants also moved for summary disposition under MCR 2.116(C)(8), contending that plaintiffs failed to state a claim on which relief could be granted because the plain language of the ELCRA, as amended, provides that a "public service" does not include a state or county correctional facility with respect to prisoners. Defendants further argued that the amendment did not violate equal-protection principles. Plaintiffs vigorously disputed this point, arguing that the amendment was unconstitutional because it violated plaintiffs' rights to equal protection of the law, with no legitimate justification. They also highlighted that a federal district court case had found the amendment to be unconstitutional, and that decision was binding on the court.

The crux of plaintiffs' equal-protection argument at this juncture is not based on the allegation that their fundamental right to be free from sexual assault is being violated. Rather, plaintiffs' contention is that the ELCRA violates their right to equal protection because it prohibits them from filing a lawsuit based on their status as prisoners, regardless of the type of claim they seek to assert.

The trial court ultimately denied defendants' motion for summary disposition. It ruled that MCL 37.2301(b), which excluded prisons as places of public services under the ELCRA, was unconstitutional because it violated the Equal Protection Clauses of the Michigan and United States Constitutions. Defendants now appeal.

II. STANDARDS OF REVIEW

"The interpretation and application of statutes is a question of law that we review de novo." *Ewin v Burnham*, 272 Mich App 253, 255; 728 NW2d 463 (2006).[1] We also review constitutional issues de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Cadillac Mayor v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014) (quotation marks and citation omitted). Additionally, we review issues concerning the application of collateral estoppel de novo. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

III. PRISON LITIGATION REFORM ACT

A. DISCLOSURE

The PLRA "sets forth certain requirements that apply when a prisoner brings a civil action concerning prison conditions." *Anderson v Myers*, 268 Mich App 713, 715; 709 NW2d 171 (2005) (quotation marks omitted). A "prisoner" is defined as "a person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of state or local law . . . ." MCL 600.5531(e). A "civil action concerning prison

[1] To the extent that the parties did not raise the issue of plaintiffs' actual compliance with MCL 600.5507(2), we nevertheless address this issue because all the facts necessary for a decision regarding this section are before us and resolving the issue primarily is a question of law. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). The same is true of the trial court's failure to fully articulate its finding regarding whether it was bound by a federal district court opinion.

conditions" is defined as "any civil proceeding seeking damages or equitable relief arising with respect to any conditions of confinement or the effects of an act or omission of government officials, employees, or agents in the performance of their duties . . . ." MCL 600.5531(a). Plaintiffs do not dispute that each one of them is a "prisoner" and that the present case is a "civil action concerning prison conditions." Nor do the parties dispute that plaintiffs are not indigent.

MCL 600.5507, the provision in dispute, provides:

> (1) A prisoner shall not claim indigency under [MCL 600.2963][2] in a civil action concerning prison conditions or an appeal of a judgment in a civil action concerning prison conditions or be allowed legal representation by an attorney who is directly or indirectly compensated for his or her services in whole or in part by state funds if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any prison, brought an action or appeal in a court of this state that was dismissed on the grounds that it was frivolous, unless the prisoner has suffered serious physical injury or is under imminent danger of suffering serious physical injury or has suffered or is under imminent danger of suffering conduct prohibited under . . . MCL 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.
>
> (2) A prisoner who brings a civil action or appeals a judgment concerning prison conditions shall, upon commencement of the action or initiation of the appeal, disclose the number of civil actions and appeals that the prisoner has previously initiated.
>
> (3) The court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds any of the following:
>
> (a) The prisoner's claim of injury or of imminent danger under subsection (1) is false.

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[2] MCL 600.2963 deals more specifically with prisoners initiating civil suits.

> (b) The prisoner fails to comply with the disclosure requirements of subsection (2).

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). "The first criterion in determining intent is the language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. . . . Unless defined in the statute, every word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Chico-Polo v Dep't of Corrections*, 299 Mich App 193, 198; 829 NW2d 314 (2013) (quotation marks and citations omitted). We also presume every word in a statute has meaning, and avoid construing the statute in a way that would render any part surplusage or nugatory. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 565; 741 NW2d 549 (2007). Furthermore, "[a] provision in a statute is ambiguous only if it irreconcilably conflicts with another provision, or when it is *equally* susceptible to more than a single meaning." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008) (quotation marks and citation omitted).

When filing this action, plaintiffs disclosed the following in their complaint:

> A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in this court, where it

was given docket number 13-1049-CZ and was assigned to Judge Kuhnke. The action is no longer pending.

In addition, a civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in the Eastern District of Michigan and was assigned to Judge Cleland. The action remains pending.

There are several deficiencies in plaintiffs' disclosures. First, Subsection (2) requires a prisoner to "disclose the number of civil actions and appeals that *the prisoner* has previously initiated." (Emphasis added). The language in plaintiffs' complaint is that there were civil actions "between *these parties or other parties* arising out of the transaction or occurrence alleged in the complaint."[3] This disclosure is ambiguous regarding the identities of the parties in the previous litigation, and leaves to speculation whether it was "the prisoner[s]" from this case as a full group, partial group, or individually.

Second, Subsection (2) requires disclosure of "the number of civil actions and appeals that the prisoner has *previously initiated*." MCL 600.5507(2) (emphasis added). Even assuming that plaintiffs initiated the two previously filed civil actions, their disclosure did not indicate whether those were the only civil actions and appeals they previously initiated as a group or individually. Instead, they disclosed only two previously filed actions "arising out of the transaction or occurrence alleged in the complaint." Yet the plain language of Subsection (2) requires that a prisoner "shall . . . disclose the number of civil actions and appeals that the prisoner has previously initiated." MCL 600.5507(2). There is no limiting language that prisoners only should disclose civil actions arising out of

[3] Ostensibly, this was an attempt to comply with MCR 2.113(C)(2).

the transaction at issue in the present complaint. Here, plaintiffs' disclosure left open the possibility that any of the plaintiffs initiated civil actions or appeals concerning prison conditions that did not arise out of the transaction or occurrence alleged in the complaint. Further, "[t]he statute does not predicate the disclosure requirement upon the prisoner having, in fact, previously filed civil actions or appeals." *Tomzek v Dep't of Corrections*, 258 Mich App 222, 224; 672 NW2d 511 (2003). So, even if plaintiffs had not initiated any other civil suits, the deficiency in their disclosure statement would not have been cured.

Accordingly, we reject any contention that plaintiffs' complaint complied with Subsection (2) of MCL 600.5507.

B. INDIGENCY

We now turn to plaintiffs' argument under the PLRA, namely, that Subsection (2) does not apply to nonindigent prisoners. We conclude that it does.

Subsection (2) provides, "*A* prisoner who brings a civil action . . . concerning prison conditions shall . . . disclose the number of civil actions . . . that the prisoner has previously initiated." MCL 600.5507(2) (emphasis added). The words "the" and "a" have different meanings. *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). " 'The' is defined as 'definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an).' " *Robinson v Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (citations omitted).

Subsection (2) employs the word "a" to describe the class of prisoners who must disclose the number of civil actions previously filed. As defined earlier, "a" has no

specifying or particularizing effect. Thus, the plain language of Subsection (2) indicates that it applies to prisoners, without limitation to indigent prisoners. Indeed, plaintiffs acknowledge that Subsection (2) does not expressly limit the requirement to indigent prisoners. Because the statute is unambiguous, we are mindful that nothing may be read into it. *Tevis*, 283 Mich App at 81.

Nevertheless, as plaintiffs point out, it is true that a statutory provision cannot be read in isolation. *Robinson*, 486 Mich at 15. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context.") (quotation marks and citation omitted). However, the remaining language of MCL 600.5507 does not indicate that Subsection (2) applies only to indigent prisoners.[4]

Subsection (1) pertains to the limitation on when a prisoner may claim indigency in a civil action under MCL 600.2963.[5] However, the Legislature employed no language in Subsections (2) or (3) limiting their requirements to prisoners who are indigent, or to those listed in Subsection (1). Plaintiffs urge this Court to look at legislative history and the editorially supplied catchline of MCLA 600.5507, which states, "Claim of indigency in civil actions concerning prison conditions, prohibitions." See also MCLS 600.5507 ("Claim of indigency; limitations; exceptions . . . .") and Public

[4] Although plaintiffs attempt to draw an inference from federal law, namely 28 USC 1915, regarding proceedings *in forma pauperis*, nothing in that statute is similar to MCL 600.5507(2) and the language regarding disclosure.

[5] MCL 600.2963 deals more specifically with prisoners filing civil actions.

and Local Acts of 1999, p 978 ("Claim of indigency; limitations . . . ."). "However, the catch line of a statute is not part of the statute itself, and should not be used to construe the section more broadly or narrowly than the text of the section would indicate." *People v Mitchell*, 301 Mich App 282, 292; 835 NW2d 615 (2013). MCL 8.4b provides:

> The catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes.

We also decline to rely upon legislative history. Legislative intent is discerned from the words of the statute itself as that is what was enacted into law. *Chico-Polo*, 299 Mich App at 198. Furthermore, our interpretation of the statute "ensures that it works in harmony with the entire statutory scheme." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), and *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009); see also *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 429; 648 NW2d 205 (2002). Our interpretation is consistent with the underlying purpose of the PLRA, which is to manage the overall number of suits prisoners initiate. See, e.g., MCL 600.5503(1) (prohibiting a prisoner from filing an action concerning prison conditions unless the prisoner has exhausted all available administrative remedies); MCL 600.5503(3) (prohibiting courts from appointing counsel paid for in whole or in part at taxpayer expense to a prisoner for the purpose of filing an action concerning prison conditions); MCL 600.5505(1) and (2) (stating that MCL 600.2963 applies to civil actions concerning prison conditions and requiring courts to

dismiss a case at any time for several reasons); MCL 600.5509 (stating that a court shall review as soon as practicable a civil complaint in which a prisoner seeks redress from a governmental entity and requiring the court to dismiss the action if the complaint is frivolous or seeks monetary relief from a defendant who is immune from the requested relief).

Plaintiffs, however, advance an alternative interpretation of the statute. As discussed, Subsection (1) generally prohibits a prisoner from claiming indigency under MCL 600.2963 if the prisoner has, on three or more occasions, while incarcerated or detained in any prison, brought an action that was dismissed because it was frivolous. Plaintiffs contend that Subsection (2) is the mechanism for determining whether a prisoner has brought three or more civil actions that have been dismissed as frivolous, thereby preventing them from claiming indigency under Subsection (1).

Yet plaintiffs fail to address MCL 600.5529, which provides:

> (1) The state court administrative office shall compile and maintain a list of the civil actions concerning prison conditions brought by a prisoner that are dismissed as frivolous. The list shall include an account of the amount of unpaid fees and costs associated with each dismissed case. *The list shall be made available to the courts of this state for the purpose of ascertaining the existence and number of civil actions concerning prison conditions filed by each prisoner*, and any associated unpaid fees and costs, for the purposes described in this chapter.
>
> (2) *A court in which a civil action concerning prison conditions is brought shall refer to the list described in subsection (1) to determine the number and existence of civil actions concerning prison conditions previously filed by a prisoner* and any associated unpaid fees and costs. [Emphasis added.]

Thus, pursuant to MCL 600.5529, a court determines whether claims have been dismissed because of frivolity by consulting the list that the State Court Administrative Office compiles and maintains. The court does not perform this function on the basis of a prisoner's disclosures under Subsection (2). In fact, Subsection (2) does not require a prisoner to disclose how many of the civil actions and appeals were dismissed because they were *frivolous*. Rather, it only requires a prisoner to "disclose the number of civil actions and appeals that the prisoner has previously initiated." Because the disclosure required by Subsection (2) is not limited to previous civil actions and appeals that were dismissed as frivolous, plaintiffs' argument fails.

Plaintiffs also rely on the rule of statutory construction known as the "absurd-results rule." See *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008). Under this rule, "a statute should be construed to avoid absurd results that are manifestly inconsistent with legislative intent[.]" *Id*. (quotation marks and citation omitted). In other words, "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result." *Id*. at 675. Plaintiffs assert that absent a relationship between Subsections (1) and (2), the disclosure required by Subsection (2) serves no purpose. However, the premise of plaintiffs' argument is that the disclosure requirement in Subsection (2) serves the purpose of determining whether a prisoner may claim indigency. Yet, as explained earlier, plaintiffs are not required to disclose how many of the previous cases were dismissed based on frivolity. Therefore, we reject plaintiffs' argument based on the absurd-results rule.

Furthermore, "[t]he wisdom of a statute is for the determination of the Legislature and the law must be enforced as written." *Gilliam v Hi-Temp Prod Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003). "The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction." *Id*.

Thus, we conclude that the disclosure requirement in MCL 600.5507(2) unambiguously applies to all prisoners, not only those claiming indigency.

C. REMEDY

Alternatively, plaintiffs contend that the proper remedy for noncompliance with the disclosure requirements is a remand to permit them to amend the complaint, rather than dismissal. We disagree.

Pursuant to MCL 600.5507(3)(b), "[t]he court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds" that the "prisoner fails to comply with the disclosure requirements of subsection (2)." Despite this clear directive, plaintiffs contend that they should have been permitted to amend their complaint. See MCR 2.118(A)(2) ("Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."). Defendants, however, posit that Subsection (3) precludes amendment of the complaint because that provision states that the court *shall* dismiss a civil action if the prisoner fails to comply with Subsection (2) of the statute.

The word "shall" is unambiguous and denotes "a mandatory, rather than discretionary action." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). Consistently with the plain language of the

statute, in *Tomzek*, 258 Mich App at 223, we held "that the statutory language mandates dismissal of the appeal, without regard to how or when the issue was raised." We also recognized that the failure to disclose the number of previous civil actions or appeals was fatal, even if that number was zero. *Id*. at 224-225. Likewise, in *Komejan v Dep't of Corrections*, 270 Mich App 398, 399-400; 715 NW2d 375 (2006), we held as follows:

> If a prisoner fails to disclose the number of previous suits, the statute explicitly instructs the court to dismiss the action. MCL 600.5507(3)(b). Plaintiff did not disclose the number of civil actions relating to prison conditions that he had previously pursued, so the trial court should have dismissed this suit. The fact that plaintiff had never pursued a civil action before does not excuse his lack of disclosure because a prisoner is obligated to disclose the number of civil actions and appeals he had previously initiated, even when that number is zero. Plaintiff's failure to disclose the number of previous civil actions he commenced mandates the dismissal of this case. [Quotation marks, ellipsis, and citation omitted.]

Relying on federal caselaw, plaintiffs claim they should be given the opportunity to amend the complaint. However, the federal decisions it cites are not binding on this Court. *State Treasurer v Sprague*, 284 Mich App 235, 241; 772 NW2d 452 (2009). Plaintiffs also cite MCL 600.2301, which provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The applicability of MCL 600.2301 rests on a two-pronged test: (1) whether a substantial right of a party is implicated, and (2) whether a cure is in furtherance of justice. *Bush*, 484 Mich at 177. Plaintiffs make no argument regarding either prong of this test. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008) (stating that a party's failure to properly address the merits of an assertion of error constitutes an abandonment of the issue on appeal).

Furthermore, plaintiffs' contention is contrary to a cardinal rule of statutory interpretation: "If the language employed by the Legislature is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and this Court must enforce the statute as written." *Ameritech Pub, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). The language of MCL 600.5507(3) is unambiguous. Consistent with our prior, published caselaw, we apply the statute as written and hold that dismissal is mandated.

Because a plaintiff would be precluded by statute from going forward with this lawsuit, ordinarily we would need not address plaintiffs' additional claims. But, because it is not clear whether any of the John Doe plaintiffs would be free, individually, in the future to bring the claims they now allege under the ELCRA and Equal Protection Clauses, we will consider them here. Further, the Michigan Supreme Court specifically remanded this case for consideration of the issues raised on leave granted. *Doe*, 497 Mich at 881.

IV. ELLIOTT-LARSEN CIVIL RIGHTS ACT

A. BACKGROUND LAW

Defendants contend that the trial court erred by denying their second motion for summary disposition

regarding plaintiffs' substantive claims based on the ELCRA. Primarily, defendants argue that the amendment to the ELCRA, which excluded prisoner lawsuits, is not a violation of equal protections.

The ELCRA provides:

> The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right. [MCL 37.2102(1).]

The statute further provides that "[e]xcept where permitted by law, a person shall not . . . [d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status." MCL 37.2302(a).

In *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730, 735-737; 592 NW2d 370 (1998), we held that prisons are places of "public service" under the ELCRA, so that discrimination against inmates is prohibited. However, the Legislature then passed 1999 PA 202,[6] which amended the definition of "public service" in the ELCRA. "Public service" now is defined as

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, *except that public service does not include a*

[6] Although not effective until 2000, this will be referred to as the 1999 amendment.

> *state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment*. [MCL 37.2301(b) (emphasis added).]

The amendment was

> curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision Neal v Department of Corrections, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act. [1999 PA 202, enacting § 1.]

On appeal, the parties do not dispute that the 1999 amendment's definition of "public service" bars the prisoners' lawsuit under the ELCRA. Instead, plaintiffs attack the amendment directly, arguing that it violates their equal protection rights.

Plaintiffs also contend that a federal district court case, *Mason v Granholm*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 23, 2007 (Docket No. 05-73943), precludes defendants from arguing otherwise. In *Mason*, virtually no factual background regarding the plaintiffs or the case was provided in the court's opinion. The court briefly summarized *Romer v Evans*, 517 US 620, 633; 116 S Ct 1620; 134 L Ed 2d 855 (1996), finding it to be an example of when the "Supreme Court struck down an amendment to the Colorado Constitution that prohibited legislative, executive, or judicial action at any level of state or local government designed to protect gays and lesbians."[7] The *Mason* court then opined:

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[7] Unlike Amendment 2 to the Colorado Constitution in *Romer*, which prohibited any governmental action designed to protect homosexuals, here the 1999 Amendment does not make it more difficult for prisoners to seek aid from the government. More importantly, the 1999 Amendment does not preclude prisoners from asking the government for

The MDOC does not argue that the ELCRA amendment advances legitimate penological interests, such as maintaining prison order. Rather, the MDOC contends that the ELCRA amendment does advance legitimate interests such as protecting the public fisc, preventing windfall awards, reducing judicial intervention in the management of prisons, deterring frivolous lawsuits by prisoners and reducing trivial or inconsequential suits. In support of its argument that the ELCRA amendment is constitutional, MDOC cites to several Sixth Circuit cases upholding challenges to the federal Prison Litigation Reform Act [PLRA], which placed some restrictions on prisoners' ability to file civil rights claims.

* * *

In contrast to the PLRA provisions upheld in . . . other cases, the ELCRA amendment paints with a much broader brush. Rather than placing some limits on prisoner litigation and deterring frivolous suits, the ELCRA amendment completely precludes prisoners from challenging the conditions of their confinement or the discriminatory practices of the MDOC under the ELCRA, while they are incarcerated or after their release, and whether their claims are meritorious or not. The amendment does not, like the PLRA amendments, essentially place prisoners in the same position with respect to filing suit as other citizens. Rather, the amendment forecloses the vindication of prisoners' equal protection rights under Michigan law.

Viewing the statute in the context of this case, the ELCRA amendment essentially permits the state to discriminate against female prisoners without fear of accountability under Michigan's civil rights law. Given the state's abhorrent and well-documented history of sexual and other abuse of female prisoners, the court finds this amendment particularly troubling. It appears that the

protection from discrimination. It only prohibits prisoners from filing a lawsuit under the ELCRA and seeking damages.

> state legislature has not attempted to deter frivolous lawsuits, but rather preclude meritorious ones.
>
> Moreover, while deterring frivolous suits and protecting the public treasury are legitimate government interests, the ELCRA amendment is too broad to be rationally related to these interests. The ELCRA amendment denies prisoners the basic protections against discrimination that all others are afforded under Michigan law, *as required by* Article I, Section Two of the Michigan Constitution, which provides that "The legislature shall implement this section by appropriate legislation." There is no rational basis for denying *all* prisoners (including those who have been released) — and no one else — the ability to seek redress for illegal discrimination that occurred in prison. As the Romer court explained, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."
>
> Accordingly, the court concludes that the ELCRA amendment violates prisoners' equal protection rights and is unconstitutional. [*Mason*, unpub op at 5-8 (citations and quotation marks omitted).]

On appeal, both parties contest the effect *Mason* should have on this case and this Court. For the following reasons, we conclude that *Mason* is not binding.

B. FEDERAL COURT DECISIONS

"Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citation omitted). In other words, while "lower federal court decisions may be persuasive, they are not binding on state courts." *Id*. at 607. Thus, we

reject any argument that we are required to find that the 1999 amendment to the ELCRA violates equal protection simply because a federal district judge in a limited, unpublished opinion came to that conclusion.

Plaintiffs nevertheless argue that a statute declared unconstitutional is void *ab initio*. *Stranton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144; 253 NW2d 114 (1977). See also *Norton v Shelby Co*, 118 US 425, 442; 6 S Ct 1121; 30 L Ed 178 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). Relying on this rule, plaintiffs contend that because the 1999 amendment was declared unconstitutional in *Mason*, it cannot be enforced against them. However, plaintiffs fail to recognize that the courts of this state have equal responsibility to protect litigants' constitutional rights, *Steffel v Thompson*, 415 US 452, 460-461; 94 S Ct 1209; 39 L Ed 2d 505 (1974), and that state courts are not bound by decisions of lower federal courts, *Johnson v Williams*, 568 US ___; 133 S Ct 1088, 1098; 185 L Ed 2d 105 (2013); *Abela*, 469 Mich at 606.[8]

C. PRECLUSION

1. BACKGROUND LAW

Plaintiffs next contend that even if the federal district court opinion in *Mason* was not itself binding, the court's determination nevertheless has preclusive

[8] Although plaintiffs rely on *Dascola v Ann Arbor*, 22 F Supp 3d 736 (ED Mich, 2014), that case is inapposite. In *Dascola*, the issue was not whether the previous federal ruling prevented the defendants from arguing, in state court, that the statute was constitutional.

effect on defendants because of collateral estoppel.[9] "The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v Sturgell*, 553 US 880, 891; 128 S Ct 2161; 171 L Ed 2d 155 (2008). See also *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 381; 596 NW2d 153 (1999) ("The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.") (quotation marks and citation omitted). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980).

The application of collateral estoppel is conditioned on the fulfillment of four requirements:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. [*Hamilton's Bogarts, Inc v Michigan*, 501 F3d 644, 650 (CA 6, 2007) (quotation marks and citation omitted).]

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[9] We find no merit to defendants' initial argument that the United States Court of Appeals for the Sixth Circuit in *Mason* held that the federal district court's decision had no preclusive effect in subsequent lawsuits. The issue before the Sixth Circuit in that matter was whether the defendants were entitled, at that point in time, to appeal the federal district court's decision. As stated in the Sixth Circuit's order, it considered and rejected the defendants' argument that the *Mason* decision "permanently enjoins the State Defendants from raising a valid defense to this lawsuit and in subsequent lawsuits" in light of the standards for granting an interlocutory appeal.

Although mutuality originally was a requirement, federal courts have

> allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case[.] But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. [*Allen*, 449 US at 94-95.]

See also *Laborers' Pension Trust Fund Detroit & Vicinity v Lange*, 825 F Supp 171, 175-176 (ED Mich, 1993); *In re Air Crash at Detroit Metro Airport, Detroit, Mich on Aug 16, 1987*, 776 F Supp 316, 322 (ED Mich, 1991).

In the present case, plaintiffs seek to use offensive collateral estoppel, which occurs when "a plaintiff [seeks] to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co, Inc v Shore*, 439 US 322, 329; 99 S Ct 645; 58 L Ed 2d 552 (1979). Trial courts have broad discretion to determine whether to permit the use of offensive collateral estoppel. *Id*. at 331. "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id*.

2. UNMIXED QUESTIONS OF LAW

Defendants contend that the exception to collateral estoppel for "unmixed questions of law in successive actions involving substantially unrelated claims" ap-

plies in this case. *Montana v United States*, 440 US 147, 162; 99 S Ct 970; 59 L Ed 2d 210 (1979) (quotation marks omitted).[10]

The United States Supreme Court has explained the exception as the following:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.
>
> Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. [*Id*. (quotation marks and citation omitted).]

Further, "[t]his exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine

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[10] Defendants also raise several unpersuasive reasons for why collateral estoppel is not applicable in this case. For example, they contend that the defendants in *Mason* lacked incentive to litigate the constitutionality of the 1999 amendment. According to the United States Supreme Court, "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable." *Parklane*, 439 US at 330. Yet, in seeking a stay from the district court's order, defendants argued that an untold number of lawsuits would result. Thus, defendants appeared cognizant of the stakes in *Mason*. Moreover, most of defendants' arguments rest on their attempt to characterize this as an issue regarding the authority of state courts to decide issues. That is a different issue than collateral estoppel; collateral estoppel is concerned with whether a party should have a second chance to litigate an issue. See *Parklane Hosiery Co*, 439 US at 326-327.

in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Id*. at 162-163.

But plaintiffs argue that this exception does not apply here because rather than an "unrelated subject matter," the subject matter in *Mason* and the present case is identical. We agree that the legal issue is identical, although because of the scarcity of facts presented in the *Mason* decision, it is difficult to discern the degree of factual similarity in the two cases. While one difference appears to be that the prisoners in *Mason* were females, as the Court explained in *United States v Stauffer Chem Co*, 464 US 165, 172; 104 S Ct 575; 78 L Ed 2d 388 (1984), factual differences must be of legal significance. Any factual differences between *Mason* and the present case do not appear to be legally significant regarding whether the 1999 amendment is constitutional.

However, in *Pharm Care Mgt Ass'n v Dist of Columbia*, 522 F3d 443, 446; 380 US App DC 418 (2008), the court observed that "[l]ess is required for the exception to apply in a case of non-mutual estoppel—such as this case." The court explained that "[i]n a non-mutual case, an issue is *not* precluded if it is one of law and treating it as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based." *Id*. at 446-447 (quotation marks and citations omitted). The federal court explained that applying collateral estoppel in such an instance would "freeze the development of the law in an area of substantial public interest." *Id*. at 447.

We find this reasoning to be persuasive. The issue of whether prisoners can sue for relief under the ELCRA, which is a pure legal question, is one of substantial

public interest. It also requires courts to venture into the hallowed domain of constitutional law. Applying collateral estoppel in the present case, because one federal district court—in an unpublished case—ruled that the 1999 amendment was unconstitutional, would freeze this area of law prematurely and improperly.

3. STATE AS A PARTY

Also relevant is that defendants are state actors. In *United States v Mendoza*, 464 US 154, 158, 162; 104 S Ct 568; 78 L Ed 2d 379 (1984), the United States Supreme Court held that nonmutual offensive collateral estoppel cannot be used against the federal government. It explained its reasoning as follows:

> We have long recognized that the Government is not in a position identical to that of a private litigant, both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates. It is not open to serious dispute that the Government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity . . . . Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the Government is a party. Because of those facts the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.
>
> A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several

courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari.

The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision. The Court of Appeals faulted the Government in this case for failing to appeal a decision that it now contends is erroneous. But the Government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.

In addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue. While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law, the former nonetheless controls the progress of Government litigation through the federal courts. It would be idle to pretend that the conduct of Government litigation in all its myriad features, from the decision to file a complaint in the United States district court to the decision to petition for certiorari to review a judgment of the court of appeals, is a wholly mechanical procedure which involves no policy choices whatever. [*Id*. at 159-161.]

Defendants reason that, as nonmutual offensive collateral estoppel cannot be used against the federal

government, it likewise should not be applied against state governments. Although some federal circuits have found that states are unlike the federal government, and therefore the reasoning of *Mendoza* does not apply, see *Benjamin v Coughlin*, 905 F2d 571, 576 (CA 2, 1990), we disagree. Instead, we find federal cases applying this rule to state courts to be more persuasive and, therefore, we will follow them.

For example, in *In re Complaint of Hercules Carriers, Inc*, 768 F2d 1558, 1579 (CA 11, 1985), the Eleventh Circuit held "that the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments." The court reasoned that *Mendoza* did not differentiate between the interests of the federal government and state government, nor was there anything in *Mendoza* to suggest that the concerns expressed by the court were "peculiar to the federal government." *Id*.[11] Likewise, in *Idaho Potato Comm v G&T Terminal Packaging, Inc*, 425 F3d 708, 714 (CA 9, 2005), the Ninth Circuit held that the rationale in *Mendoza* applied to state governments.[12]

Like the federal government, state governments are subject to suit at a frequency that even the most

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[11] Although plaintiffs focus on the fact that the court in *Hercules* noted that the case involved different state agencies, that was only one additional reason the court provided. Further, we note that all the defendants in this case do not appear to be identical to all of the defendants in *Mason*.

[12] See also *Chambers v Ohio Dep't of Human Servs*, 145 F3d 793, 801 n 14 (CA 6, 1998), wherein the Sixth Circuit opined, in the context of Ohio law, that "[a]lthough the *Mendoza* rationale has not been definitively extended to apply to state governments, there is support for that proposition. The same considerations set forth in *Mendoza* with respect to the federal government may apply to state governments." (Citations omitted.) The Sixth Circuit concluded that "[w]hile Ohio law is silent in

litigious private entity does not come close to reaching. Further, government litigation frequently involves legal questions of substantial public importance, such as in this case. We also agree that, because of differences between a state government and private litigants, applying nonmutual collateral estoppel against a state government would thwart the development of important questions of law. It would freeze as final the first decision rendered on a particular legal question, most times prematurely. *Mendoza*, 464 US at 160. That is especially so in this case, as plaintiffs are attempting to offensively apply nonmutual collateral estoppel from an unpublished, limited federal district court case to the matter before us. This application of collateral estoppel would prematurely prevent future courts from exploring these complex and important legal issues as they would be perpetually frozen in time.

Accordingly, defendants are not precluded by *Mason* from arguing that the 1999 amendment to the ELCRA is constitutional.

V. EQUAL PROTECTION

A. BACKGROUND LAW

Because *Mason* is not binding on us or defendants, we next address whether the 1999 amendment to the ELCRA is facially unconstitutional as violative of equal protection.

Under the United States Constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV. The Michigan Constitution provides:

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this respect, given its restrictive views on mutuality, we anticipate that the Ohio Supreme Court would not use offensive non-mutual issue preclusion against the state." *Id*.

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. [Const 1963, art 1, § 2.]

The Equal Protection Clause in the Michigan Constitution is coextensive with the Equal Protection Clause in the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). "[T]he constitutional demand is not a demand that a statute necessarily apply equally to all persons." *Rinaldi v Yeager*, 384 US 305, 309; 86 S Ct 1497; 16 L Ed 2d 577 (1966). "While the Equal Protection Clause ensures that people similarly situated will be treated alike, it does not guarantee that people in different circumstances will be treated the same." *In re Parole of Hill*, 298 Mich App 404, 420; 827 NW2d 407 (2012) (quotation marks, brackets, and citation omitted). The threshold inquiry is whether the plaintiff was treated differently from a similarly situated entity. *Shepherd Montessori*, 486 Mich at 318. Further,

> [t]o determine whether a legislative classification violates equal protection, the reviewing court applies one of three tests. If the legislation creates an inherently suspect classification or affects a fundamental interest, the "strict scrutiny" test applies. Other classifications that are suspect but not inherently suspect are subject to the "substantial relationship" test. However, social and economic legislation is generally examined under the traditional "rational basis" test. [*Zdrojewski v Murphy*, 254 Mich App 50, 79; 657 NW2d 721 (2002) (citations omitted).]

It is well established that "prisoners" are not a suspect class. See *People v Groff*, 204 Mich App 727, 731; 516 NW2d 532 (1994). Plaintiffs' argument that the 1999 amendment "stripped all and only prisoners

of any of ELCRA's remedies for unquestionably unconstitutional discrimination based on age, [disability,] race, and gender" is not availing. Importantly, the classification in the 1999 amendment at issue is based on a person's status as a *prisoner*, not based on any of the suspect classifications of age, disability, race, or gender. In other words, the 1999 amendment applies to *all* prisoners, including males and females, the young and old, the abled and disabled, and individuals of all different races. Those suspect classifications simply are not the dividing lines in this case.

Furthermore, plaintiffs have not sufficiently alleged that the 1999 ELCRA amendment itself infringes a protected, fundamental right. Any right implicated emanates from the statute, which declares that

> [t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, *public service*, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status . . . is recognized and declared to be a civil right. [MCL 37.2102(1) (emphasis added).]

Plaintiffs cite no authority that limits the Legislature's authority to define what constitutes (or does not constitute) a "public service" under the ELCRA. There is nothing in the constitutional mandate regarding public accommodation or public service. Since the Legislature created these civil rights,[13] it naturally follows that it can define the scope of them. See *Beech Grove Inv Co v Civil Rights Comm*, 380 Mich 405, 426;

[13] We note that these legislatively created rights are more expansive than the rights constitutionally protected under Const 1963, art 1, § 2, which only covers discrimination on the basis of "religion, race, color or national origin." In fact, because plaintiffs' claims allege discrimination on the basis of sex, it is clear that the constitutional rights are not implicated.

157 NW2d 213 (1968), quoting Cramton, *The Powers of the Michigan Civil Rights Commission*, 63 Mich L Rev 5, 9 (1964) (noting that civil rights were not specifically defined in the Constitution and that the Legislature was to "define their scope, limits, and sanctions").

The fact that this Court has determined that the pre-1999 amendment term "public service" includes prisons does not stand for the proposition that the Legislature could never alter the definition thereafter. See *Doe v Dep't of Corrections*, 240 Mich App 199, 201; 611 NW2d 1 (2000) ("If it is the intent of the Legislature not to have these statutes applied to prisoners and prisons, then it is incumbent on the Legislature to draft and enact statutes that so provide."). Indeed, because of the fact that prisons are not "open to the public," their exclusion as a place of "public service" is reasonable. See *id*. at 206-207 (GRIBBS, J., dissenting) (noting that prisons are not established to provide services *to* the public).

Consequently, because no suspect class—based on age, disability, race, or gender—is being singled out and no fundamental right is being affected, we apply the rational basis test to determine whether the 1999 amendment violates equal protection.[14] "Under the rational basis test, legislation is presumed to be constitutional and will survive review if the classification scheme is rationally related to a legitimate governmental purpose." *Zdrojewski*, 254 Mich App at 80. Further, "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute." *Shepherd Montessori*, 486 Mich at 319 (quotation marks, brackets, and

[14] Although plaintiffs cite *Romer* and contend that heightened scrutiny should apply, the Court in *Romer* applied rational basis review. *Romer*, 517 US at 632-635.

citation omitted). Thus, "[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003) (quotation marks and citation omitted). A classification reviewed under the rational basis test survives if the legislative judgment is supported by any set of facts, either known or that could reasonably be assumed, even if such facts are debatable. *Id*. As our Supreme Court has cautioned, rational basis review does not test the need, wisdom, or appropriateness of the legislation, nor whether the classification is made with mathematical nicety or whether it results in some inequity in practice. *Id*. Rather, the statute is presumed constitutional, and the challenger bears a heavy burden of rebutting this presumption. *Id*.

B. SIMILARLY SITUATED

Our Supreme Court has advised that, when reviewing an equal-protection challenge to state legislation, the threshold inquiry is whether the plaintiff was treated differently from a similarly situated class of individuals. *Shepherd Montessori*, 486 Mich at 318. Defendants contend that prisoners are not similarly situated to nonprisoners. Plaintiffs make no claim that prisoners are similarly situated to nonprisoners. Instead, they assert that a "similarly situated" analysis is not applicable because that inquiry only applies to "class of one" claims. However, even in cases that do not involve class-of-one claims, we have recognized that equal protection requires only equal treatment for those who are similarly situated. See *Schmude Oil, Inc v Dep't of Environmental Quality*, 306 Mich App 35, 55; 856 NW2d 84 (2014); *Brinkley v*

Brinkley, 277 Mich App 23, 35; 742 NW2d 629 (2007); *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). Moreover, "[t]o be considered similarly situated, the challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects." *Demski v Petlick*, 309 Mich App 404, 464; 873 NW2d 596 (2015) (quotation marks and citation omitted); *Schmude Oil, Inc*, 306 Mich App at 55 (quotation marks and citation omitted).

Prisoners and nonprisoners are not similarly situated in the relevant respects in this case. The most obvious difference is that prisoners lack liberty when receiving what plaintiffs argue are public services. Prisoners are not receiving services from prisons as a result of an invitation or a voluntary arrangement. Very few, if any, voluntarily avail themselves of residency in a correctional facility. Rather, they are compelled to be there, and must be content, for the most part, with the services provided. See *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 439; 628 NW2d 471 (2001) (opinion of CORRIGAN, C.J.) ("[A]n inmate does not visit a jail as a potential invitee. Instead, inmates are *legally compelled* to be there."). Thus, they are not receiving these alleged public services as some type of benefit but instead as a necessary component of the punishment to which a court has sentenced them. Further, while receiving these services, prisoners are not in the same position as the general public, as many of their fundamental rights are severely curtailed. See *Samson v California*, 547 US 843, 848-849; 126 S Ct 2193; 165 L Ed 2d 250 (2006); *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). See also *People v Maxson*, 181 Mich App 133, 135; 449 NW2d 422 (1989) (stating that "inmates and ordinary citizens are not

similarly situated" in the context of prosecutions for possession of metallic knuckles).[15]

Therefore, especially in light of the fact that plaintiffs fail to offer a cognizable argument that prisoners are similarly situated to nonprisoners, we find there is no genuine issue of material fact regarding prisoners being similarly situated, i.e., identical in all relevant respects or directly comparable in all material respects, to nonprisoners. *Demski*, 309 Mich App at 464.[16]

C. RATIONAL BASIS

However, even if we were to find that prisoners are similarly situated to nonprisoners, or even if we were not required to engage in such an analysis, plaintiffs' claim would still fail because plaintiffs have failed to show how the 1999 amendment was not rationally related to a legitimate governmental interest.

Defendants offer several purposes behind the 1999 amendment, the first being prison order and management. Generally, it is true that the maintenance of order in a prison is an essential goal that could require limiting or retracting the rights of a prisoner. *Bell v Wolfish*, 441 US 520, 546; 99 S Ct 1861; 60 L Ed 2d 447 (1979). But we fail to see how prohibiting prisoners

[15] In various other contexts, courts have found that prisoners and nonprisoners are not similarly situated. See *Smith v Corcoran*, 61 F Appx 919 (CA 5, 2003); *Roller v Gunn*, 107 F3d 227, 234 (CA 4, 1997); *Scher v Chief Postal Inspector*, 973 F2d 682, 683-684 (CA 8, 1992); *Hrbek v Farrier*, 787 F2d 414, 417 (CA 8, 1986); *Niemic v UMass Correctional Health*, 89 F Supp 3d 193 (D Mass, 2015); *Pratt v GEO Group, Inc*, 802 F Supp 2d 1269, 1272 (WD Okla, 2011); *Hertz v Carothers*, 174 P3d 243, 248 (Alas, 2008); *McGuire v Ameritech Servs, Inc*, 253 F Supp 2d 988, 1001 (SD Ohio, 2003); *Rudolph v Cuomo*, 916 F Supp 1308, 1323 (SD NY, 1996).

[16] Because we agree that prisoners are not similarly situated, we decline to address defendants' alternate arguments regarding this issue.

from suing for damages for discrimination under the ELCRA serves the purpose of maintaining prison order. Accordingly, we conclude that this purpose is not rationally related to a legitimate governmental interest.

However, the second purpose defendants offer is the deterrence of meritless lawsuits and the preservation of scarce resources through the reduction of costs associated with resolving those lawsuits. Several courts have already recognized that the preservation of scarce governmental resources from frivolous prisoner actions is a legitimate government interest.

In *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457; 639 NW2d 332 (2001), the plaintiff argued that the provisions of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., that excluded incarcerated prisoners from obtaining public records violated equal protection. *Id*. at 468. This Court disagreed. *Id*. at 469-470. We held "that the Legislature's FOIA exclusions singling out incarcerated prisoners rationally relate to the Legislature's legitimate interest in conserving the scarce governmental resources squandered responding to frivolous FOIA requests by incarcerated prisoners." *Id*. at 469.

In *Morales v Parole Bd*, 260 Mich App 29; 676 NW2d 221 (2003), the plaintiff argued that MCL 791.234, which precluded prisoners from appealing the decision of a parole board, violated equal protection. However, we held that the exclusion was "rationally related to the Legislature's legitimate interest in saving public funds in response to innumerable frivolous requests by incarcerated prisoners for the review of the Parole Board's denials of parole. We recognize the government's legitimate interest in conserving the scarce governmental resources[.]" *Id*. at 52.

In cases involving the federal PLRA, the deterrence of meritless lawsuits likewise has been recognized as a legitimate governmental interest. In *Hampton v Hobbs*, 106 F3d 1281, 1283 (CA 6, 1997), the plaintiff argued that the fee requirements of the federal PLRA, which required all prisoners to pay an initial filing fee, violated equal protection. The Sixth Circuit found that "[d]eterring frivolous prisoner filings in the federal courts falls within the realm of Congress's legitimate interests, and the specific provisions in question are rationally related to the achievement of that interest." *Id*. at 1287.

In *Hadix v Johnson*, 230 F3d 840, 842 (CA 6, 2000), the plaintiff argued that the attorney fee cap provision in the federal PLRA violated equal protection. The Sixth Circuit disagreed, finding that the "cap does appear to be rationally related to the very similar goal of decreasing marginal or trivial lawsuits." *Id*. at 845. The court explained that "in lowering the fee recoverable if the claim succeeds, attorneys are likely to demand a more meritorious claim to make the representation worthwhile." *Id*. The Sixth Circuit also found that Congress, by reducing marginal or frivolous lawsuits, "could also rationally be seeking to protect the state and federal treasuries, from which the majority of prisoner civil rights awards are paid." *Id*.

In *Walker v Bain*, 257 F3d 660, 669 (CA 6, 2001), the Sixth Circuit found that the PLRA's cap on the defendants' liability for attorney fees did not violate equal protection. The *Walker* court followed the holding in *Hadix* that the "twin goals of decreasing marginal lawsuits and protecting the public fisc are legitimate government interests, and that decreasing an attorney fee award in the context of prisoner civil rights litigation serves both of these interests." *Walker*, 257 F3d at 669.

As the foregoing cases illustrate, it is well established that deterring frivolous prisoner lawsuits furthers a legitimate governmental interest. Not only can the Legislature impose limits on how prisoners interact with the courts, it can wholly preclude them from filing certain claims. See *Proctor*, 248 Mich App at 469-470. Even if defendants did not provide any evidence that prisoners have a history of excess filings of frivolous discrimination claims, this fact does not make the 1999 amendment invalid. That is because legislation subject to rational basis review "passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Harvey*, 469 Mich at 7 (quotation marks and citation omitted). Thus, the Legislature could reasonably assume that prisoners frequently file frivolous lawsuits in general. Scarce resources are preserved when fewer lawsuits are filed against correctional facilities and prison officials. And even though prisoners with meritorious claims of discrimination are precluded by virtue of the 1999 amendment, under the rational basis test, courts do not inquire into whether the legislation results in some inequity. *Id*. Nor do we test the need, wisdom, or appropriateness of the legislation. *Id*. Rather, we remain vigilant in our limited role, which is to presume that the statute is constitutional and to hold the challenger to its heavy burden of rebutting this presumption. *Id*.

Because the 1999 amendment is rationally related to the legitimate interests of deterring frivolous lawsuits and preserving scarce public resources, we hold that the amendment passes the rational basis test and is constitutional. Accordingly, defendants were entitled to summary disposition because, with the state correctional facilities in this case not being areas of "public

service" under the ELCRA, plaintiffs have failed to state a claim on which relief could be granted. MCR 2.116(C)(8). Therefore, the trial court erred by denying defendants' motion for summary disposition on this ground. Because our analysis disposes of the lawsuit, we decline to address defendants' alternate arguments regarding plaintiffs' failure to state a claim.[17]

In essence, plaintiffs' suit here is about whether prisoners can seek a remedy under the ELCRA. We do not pass judgment on the validity of the underlying claims of this lawsuit. Although the ELCRA may not be among the avenues through which plaintiffs can seek monetary redress for their alleged injuries, as discussed, this fact alone does not render the statute unconstitutional, nor does it preclude plaintiffs from pursuing remedies available to them through other legal avenues.

Plaintiffs' claim that each of them was sexually assaulted while in a correctional facility would, if proven, amount to extremely egregious and reprehensible conduct by defendants. But this case concerns only plaintiffs' ability to sue for damages under the ELCRA, as opposed to addressing their grievances through other civil or constitutional remedies that may exist.[18] In fact, plaintiffs already have initiated a

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[17] Because we agree that prisoners are not similarly situated, we decline to address defendants' alternate arguments regarding this issue.

[18] Although plaintiff's allegations relate to the fundamental right to be free from sexual assault, at its essence, the matter before us is about the right of prisoners to sue for money damages under the ELCRA. Furthermore, the right to be free from sexual assault rests in substantive due process, and plaintiffs have asserted only an equal protection challenge to the 1999 amendment. *Doe v Claiborne Co*, 103 F3d 495, 506 (CA 6, 1996). See also *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Ingraham v Wright*, 430 US 651, 673; 97

companion case in a federal court action under 42 USC 1983. In addition, plaintiffs could again choose to seek relief under the PLRA. Additionally, they could seek injunctive relief through a constitutional action, or initiate individual tort claims. *Sharp v Lansing*, 464 Mich 792, 801; 629 NW2d 873 (2001). Thus, while prisoner lawsuits relating to correctional facilities as places of public service are precluded under the ELCRA, plaintiffs' inability to sue under this statute does not preclude them from seeking redress for the serious wrongs they are alleging through any other avenues that may be available to them.[19] Nor are plaintiffs, or others, precluded from seeking a legislative change to the ELCRA to allow prisoner public service lawsuits under the statute.[20]

VI. CONCLUSION

In Docket No. 321013, we agree with defendants that the trial court erred by failing to grant them summary disposition regarding plaintiffs' failure to comply with the disclosure requirements of MCL 600.5507. In Docket No. 321756, we likewise agree

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S Ct 1401; 51 L Ed 2d 711 (1977); *Union Pacific R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891).

[19] In their briefing, plaintiffs refer to their fundamental right to access the courts. However, in light of the many actions plaintiffs remain free to pursue, their right of access to the courts is not foreclosed by our decision in this matter. See *Mich Deferred Presentment Servs Ass'n v Comm'r of Office of Fin & Ins Regulation*, 287 Mich App 326, 336; 788 NW2d 842 (2010); *Stevenson v Reese*, 239 Mich App 513, 518-519; 609 NW2d 195 (2000); *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 595-596; 560 NW2d 644 (1996).

[20] While the dissent claims that plaintiffs would be hard-pressed to find attorneys to represent them if they were not permitted to sue under the ELCRA, that conclusion is purely speculative and not based on anything in the record before us.

with defendants that the trial court erred in failing to grant them summary disposition regarding plaintiffs' claims under the ELCRA. We have reviewed all remaining issues and find them to be without merit or unnecessary for the disposition of this appeal. We reverse and remand for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

DONOFRIO, J., concurred with RIORDAN, P.J.

BECKERING, J. (*concurring in part and dissenting in part*). This case is about the alleged rape, sexual harassment, and physical assault of minors who are confined in adult prisons operated by the Michigan Department of Corrections. At issue in this appeal is the Legislature's attempt to shield the state from liability for its conduct in allegedly condoning, perpetuating, and even participating in these grievances—and any other civil rights violations for that matter—upon our state's incarcerated individuals. Because I conclude that the Legislature's amendment of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., specifically MCL 37.2301(b), by excluding prisoners from the scope of the act, is unconstitutional, I would affirm the trial court's denial of defendants' motion for summary disposition on this issue. Because I find that plaintiffs have stated a claim, I would also affirm the trial court's denial of defendants' motion for summary disposition under MCR 2.116(C)(8). Finally, because I am bound by precedent, I must concur with the majority's ruling with respect to plaintiffs' failure to comply with the disclosure requirements of the prison litigation reform act (PLRA), specifically MCL 600.5507(2), although dismissal would be without prejudice. Were I not bound by precedent, I would allow plaintiffs to file

an amended complaint in compliance with MCL 600.5507(2).

I. PRISON LITIGATION REFORM ACT

Defendants contend that plaintiffs failed to meet the disclosure requirements set forth in the PLRA, specifically MCL 600.5507(2), which provides that "[a] prisoner who brings a civil action or appeals a judgment concerning prison conditions shall, upon commencement of the action or initiation of the appeal, disclose the number of civil actions and appeals that the prisoner has previously initiated." The majority agrees with defendants, and so do I. And I am bound by precedent to agree that dismissal is the proper remedy.

When filing suit in this case, plaintiffs identified the following on the face of their complaint:

> A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in this court, where it was given docket number 13-1049-CZ and was assigned to Judge Kuhnke. The action is no longer pending.
>
> In addition, a civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has previously been filed in the Eastern District of Michigan and was assigned to Judge Cleland. The action remains pending.

I agree with the majority's opinion that the above disclosure has all the earmarks of a disclosure in accordance with MCR 2.113(C)(2), rather than an effort to comply with MCL 600.5507(2). Despite plaintiffs' assertions that the disclosure satisfies the PLRA requirements, like the majority, I must disagree. The disclosure failed to identify the parties of the previous litigation and left no clues as to how many other lawsuits plaintiffs previously initiated. The statute

unambiguously mandates the disclosure of the number of civil actions previously initiated, "even when that number is zero." *Tomzek v Dep't of Corrections*, 258 Mich App 222, 225; 672 NW2d 511 (2003).

Although plaintiffs argue that the disclosure requirements of MCL 600.5507(2) apply only to civil actions filed by prisoners seeking indigency status, I agree with the majority that subsection (2) is not so limited. It broadly imposes the disclosure requirements on "[a] prisoner who brings a civil action" and does not qualify this language as applying only to a certain class of prisoner litigants. See *Barrow v Detroit Election Comm*, 301 Mich App 404, 414; 836 NW2d 498 (2013) (the Legislature's use of the indefinite article "a" refers to a general item, not a particular item). And for reasons that are adequately explained by the majority, there is no merit to plaintiffs' argument that either the context of the statute or the act's legislative history requires a different result.

I write separately to voice my concerns about the proper interpretation of MCL 600.5507(3) concerning whether and when dismissal of a lawsuit is required. MCL 600.5507(3) provides in pertinent part:

> The court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds any of the following:
>
> * * *
>
> (b) The prisoner *fails to comply* with the disclosure requirements of subsection (2). [Emphasis added.]

As the majority notes, employment of the phrase "shall dismiss" deems an action mandatory, and this Court in *Tomzek*, 258 Mich App at 223, held that this phrase "mandates dismissal" "without regard to how or when

the issue was raised." In light of *Tomzek*, I must concur in the result reached by the majority, although I would note that the dismissal is without prejudice.[1] My concern, however, is that this interpretation ignores the present-tense aspect of Subsection (3)(b), wherein it states that dismissal is required if the prisoner "fails to comply" with the disclosure requirements of Subsection (2). That phrase could be interpreted one of two ways in the context of the statute. One could conclude, as does *Tomzek* and the majority, that Subsection (3) requires a civil action to be dismissed if the plaintiff failed to provide the necessary disclosure information in keeping with the temporal requirement of Subsection (2), being "upon commencement of the action or initiation of the appeal."[2] However, one could also conclude that Subsection (3) only requires dismissal if the plaintiff "fails to" comply with the disclosure requirement, meaning that he or she *has not* provided the disclosure information, and thus, he or she is subject to dismissal as a consequence of such failure.[3] The former interpretation is quite literal, and begets a "Simon Says" procedural requirement. The latter is more logical and comports with the present-tense verb provided in Subsection (3), as there is no discernible reason why a case should be dismissed if the plaintiff did in fact make the disclosure, albeit not on the face of

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[1] Given the majority's corresponding substantive rulings, the nature of dismissal with respect to the PRLA issue is rendered immaterial.

[2] MCR 2.101(B) describes "Commencement of Action" as follows: "A civil action is commenced by filing a complaint with a court."

[3] The present tense of a verb is used to "express *present time*" and to "make a statement that is *true at all times*." Sabin, *The Gregg Reference Manual* (11th ed) (New York: McGraw-Hill, 2011), p 313. A court is to interpret and enforce statutes as written, and "[t]his includes, without reservation, the Legislature's choice of tense." *Holland v Consumers Energy Co*, 308 Mich App 675, 684; 866 NW2d 871 (2015).

the initial complaint.[4] What is the point of dismissal if the plaintiff has complied and defendant has the necessary information required by Subsection (2)? It would be a purely punitive measure, as dismissing a lawsuit even after the plaintiff has filed the necessary disclosure information would serve no other purpose, especially since Subsection (2) applies to nonindigent as well as indigent prisoners.

Interpreting MCL 600.5507(3) as the majority and *Tomzek* do also creates fertile ground for gamesmanship. For instance, if a plaintiff fails to comply with the statute, nothing would prevent a defendant from waiting a year or two after the lawsuit is filed to raise the issue and gain dismissal of the suit. In fact, a defendant could litigate the matter on the merits, and upon receiving an unfavorable verdict, simply invoke the plaintiff's failure to timely comply with MCL 600.5507(2) as a postjudgment parachute. Given the present interpretation, dismissal would be required years into the litigation, even if the plaintiff had filed his or her disclosure shortly after filing the complaint. Put simply, MCL 600.5507, as previously interpreted by this Court, creates an escape hatch or "get out of jail free" card to be used at the leisure of the defendant. Had this Court not already interpreted the meaning of Subsection (3), I would permit plaintiffs to file an amended complaint with the requisite disclosures under MCL 600.5507(2) such that dismissal would not be required.[5] MCR 7.215(C)(2).

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[4] One could also interpret more generally the phrase "upon commencement of the action," as used in MCL 600.5507(2), as meaning at the outset of the case, rather than necessarily being tied to the actual filing of the complaint.

[5] I note that plaintiffs were without the option of voluntarily dismissing the complaint in order to refile and comply with the disclosure requirements because they had already voluntarily dismissed once, and

II. ELCRA AND CONST 1963, ART 1, § 2

"[W]hen you take away the freedom of equality or justice of any individual, you all suffer." Statement of Delegate Malcolm Gray Dade, 1 Official Record, Constitutional Convention 1961, p 743. Somewhat befitting the present controversy, this statement was made in relation to the adoption of Const 1963, art 1, § 2, the provision at issue in this case. Yet, despite a clear constitutional mandate that the enabling legislation to be implemented in compliance with Const 1963, art 1, § 2, apply to *all* citizens, without limitation, in 1999 the Legislature attempted to take away the rights of prisoners who seek redress under the ELCRA. It is this exclusion from protection under the ELCRA that, in my opinion, renders the 1999 amendment to the ELCRA unconstitutional.

A. STANDARD OF REVIEW

At issue in this case is the constitutionality of a 1999 amendment to the ELCRA, a question that we review de novo. See *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).[6] In my view, the constitutionality of the 1999 amendment turns on an examination of Const 1963, art 1, § 2 and the directive to the Legislature contained therein. "When interpreting the

a second voluntary dismissal would have operated as an adjudication on the merits. MCR 2.504(A)(1). I also note that the trial court, before ruling on defendants' motion for summary disposition based on the disclosure requirements, stated that it would give plaintiffs leave to amend if they wished. It does not appear that plaintiffs took the opportunity to amend at that time.

[6] In reviewing the constitutionality of the statute, this Court is to presume that the statute is constitutional, and we are "to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

Constitution, our task is to give effect to the common understanding of the text[.]" *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 155; 665 NW2d 452 (2003).

B. DEVELOPMENT OF CIVIL RIGHTS LEGISLATION

1. THE MICHIGAN CONSTITUTION GUARANTEES PROTECTION TO ALL CITIZENS

Michigan's Equal Protection Clause, set forth in Const 1963, art 1, § 2, provides:

> *No person* shall be denied the equal protection of the laws; nor shall *any person* be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature *shall implement* this section by appropriate legislation. [Emphasis added.]

The second clause in the first sentence of Const 1963, art 1, § 2 guarantees certain civil rights to all, as it provides, "nor shall *any person* be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin." This guarantee is made to "any person," without exclusion or qualification. The official record of the constitutional convention demonstrates that it was unquestionably the intent of the ratifiers that civil rights protections be extended to *any* and *all* persons.[7] Indeed, the record emphasized that article 1, § 2 was in line with the "distinct trend in recent state constitutions" that "civil rights clauses . . . apply to *all persons* . . . ." 1 Official Record, Constitutional Convention 1961, p 740 (emphasis added). A

[7] "Records of the constitutional convention may be consulted to ascertain the intent of the provision" at issue. *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

committee report from the constitutional convention approvingly quoted testimony stating that the goals of the ratifiers " 'must include the intent that *each of our citizens, all of our citizens*, shall enjoy equal protection of the law *in all areas of living* which involve fundamental human rights, fundamental civil rights in this our beloved state of Michigan.' " *Id.* at 741. The committee report went on to say that "[s]uch intent, the intent that *each of Michigan's citizens* have 'equal access' to the 'fundamental rights in our complex society' . . . should in our opinion be stated simply and clearly . . . ." *Id.* (emphasis added).[8]

While the second clause of the first sentence mandates to whom protections are to apply, the second sentence of art 1, § 2 imposes a mandate on the Legislature: "[t]he legislature *shall implement* this section by appropriate legislation." The directive given to the Legislature is a mandatory one. See *Co Rd Ass'n of Mich v Governor*, 260 Mich App 299, 306; 677 NW2d 340 (2004), aff'd in part 474 Mich 11 (2005) (when interpreting a provision of the Michigan Constitution, "[i]t is well-established that the use of the word 'shall' rather than 'may' indicates a mandatory, rather than discretionary, action"). Thus, when read in combination, Const 1963, art 1, § 2 provides that the Legislature *must* enact legislation protecting the rights of *any or all* persons, without limitation. In short, article 1, § 2 required the enactment of legislation designed to pro-

[8] Although various drafts of article 1, § 2 were proposed throughout the process of drafting the Constitution, the notion that "each person" was entitled to civil rights protection or that "no person" shall be denied civil rights was maintained throughout the constitutional convention. 1 Official Record, Constitutional Convention 1961, p 739-742, 749; 2 Official Record, Constitutional Convention 1961, p 2887-2889.

tect the civil rights of *all*, and the mandatory nature of its language makes apparent that the Legislature was without authority to exclude anyone from protection under the resulting legislation.

2. THE LEGISLATURE COMPLIES WITH MANDATORY ENABLING ACT REQUIREMENTS

In response to the mandate imposed by our Constitution, the Legislature enacted the Civil Rights Act, now known as the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. The act was intended to "centralize and make uniform the patchwork of then-existing civil rights statutes" in the private sector and to "broaden the scope of the then-existing civil rights statutes to include governmental action[.]" *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730, 738-739; 592 NW2d 370 (1998) (*Neal II*). See also *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 186; 387 NW2d 821 (1986). The ELCRA provides that a person shall not

> [d]eny *an individual* the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or *public service* because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302(a) (emphasis added).]

MCL 37.2301(b), as enacted in 1976, defined "public service" as

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public . . . .

This definition of public service remained unchanged for more than 20 years.

In the mid-1990s, a group of women housed in facilities operated by the MDOC filed a class action against the MDOC alleging that male corrections personnel were systematically engaging in a pattern of sexual harassment of female inmates. *Neal v Dep't of Corrections*, 230 Mich App 202; 583 NW2d 249 (1998) (*Neal I*). Specifically, plaintiffs complained that

> the MDOC assigns male officers to the housing units at all women's facilities without providing any training related to cross-gender supervision; that women are forced to dress, undress, and perform basic hygiene and body functions in the open with male officers observing; that defendants allow male officers to observe during gynecological and other intimate medical care; that defendants require male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas; that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers' requesting sexual acts from women prisoners as a condition of retaining good-time credits, work details, and educational and rehabilitative program opportunities. [*Id*. at 205.]

In *Neal I*, this Court initially held that prisons were not a place of "public service" as the term is used in the ELCRA. *Id*. at 215. However, on rehearing, this Court held that prisons are places of "public service" and that the ELCRA was intended to protect prisoners, among others. *Neal II*, 232 Mich App at 736-738.

3. IN RESPONSE TO *NEAL II*, THE LEGISLATURE ATTEMPTS TO CARVE OUT PRISONERS FROM ALL CIVIL RIGHTS PROTECTIONS UNDER THE ENABLING ACT

In response to *Neal II*, in 1999 the Legislature attempted to carve out from protection under the ELCRA one subset of individuals—persons in our state who are incarcerated. To do so, the Legislature

amended the definition of "public service" as the term is used in the ELCRA. The term "public service" is now defined in the statute to mean

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, *except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment*. [MCL 37.2301(b) (emphasis added).]

As if there were any doubt that the 1999 amendment was intended to specifically exclude prisoners, enacting § 1 of 1999 PA 202 stated that the amendment to the ELCRA was

> curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision Neal v Department of Corrections, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

In light of that clear intention to exclude prisoners from the scope of the ELCRA's protections, it is undisputed that the 1999 amendment would prohibit the instant litigation. The remaining inquiry, in my mind, should focus on whether the Legislature had authority to enact such an exclusion in the first instance.

C. THE 1999 AMENDMENT VIOLATES A CONSTITUTIONAL MANDATE

The parties and the majority frame the issue at hand as one calling for a determination of whether the 1999 amendment to the ELCRA violates equal protection by denying prisoners, as a class, protections under the ELCRA. In my opinion, this focus is directed at the wrong section of Const 1963, art 1, § 2. I believe that

the analysis misses a more significant and dispositive issue. That is, whether the Legislature has authority, given the constitutional directive in Const 1963, art 1, § 2 pertaining to *all citizens*, to carve out a particular class of individuals and exclude them from the protections of the ELCRA.

I would hold that the Legislature acted outside of its constitutional authority by removing prisoners from the scope of the ELCRA and thereby denying protection to all. Where the analysis in this case should start, and end, in my opinion, is with the idea that Const 1963, art 1, § 2 contains more than just the guarantee of equal protection of the laws; it contains a directive to the Legislature to implement legislation that protects the rights of *all* citizens. Again, that clause provides:

> *No person* shall be denied the equal protection of the laws; nor shall *any person* be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. [Const 1963, art 1, § 2 (emphasis added).]

As noted, the necessary corollary of the phrase "nor shall any person be denied the enjoyment of his civil rights" is that *all* persons, without exclusion, are entitled to have certain civil rights protected by "appropriate legislation." The problem with the 1999 amendment to the ELCRA is that, by excluding a certain class of individuals—prisoners—from the protections of the ELCRA, the Legislature has acted in a way that is contrary to Const 1963, art 1, § 2.[9]

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[9] From the outset, the 1999 amendment was a legislative attempt to exclude prisoners from ELCRA protection, following the state's being held accountable for the assault of female prisoners in *Neal II*. Indeed, as noted, 1999 PA 202 was never shy about the notion that it expressly intended to exclude prisoners from the scope of protection under the

Thus, rather than honoring the constitutional mandate to implement civil rights legislation as to "all," the 1999 amendment expressly excludes prisoners from any protection under the ELCRA. The mandates and directives of Const 1963, art 1, § 2 could not have been clearer. Const 1963, art 1, § 2 did not state that the Legislature "shall implement" the civil rights guarantees provided to those whom it deems worthy of receiving such protection. Rather, the Constitution clearly and explicitly provides that "[n]o person" shall be denied equal protection, "nor shall any person be denied" the enjoyment of his civil rights. Such language leaves no room for reservation or qualification. The Legislature cannot ignore that plain, unambiguous constitutional mandate. Indeed, "[a] fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through the enactment of a statute." *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 93; 811 NW2d 4 (2011). Given that the resulting civil rights legislation was to apply to "any person" without limitation, the Legislature could no sooner enact an amendment to the ELCRA excluding prisoners from the scope of the statute than it could decide to exclude from the act blue-eyed individuals, African-Americans, or anyone named "Steve." See *id*. See also *Durant v State Bd of Ed*, 424 Mich 364, 392; 381 NW2d 662 (1985) ("The state may not avoid the clear requirements [of a constitutional mandate] either by specific statute or by implementation of definitions adverse to the mandate of the people."). To the extent a statute infringes a constitutional directive, the statute must

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ELCRA. The act stated that "[t]his legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility *is not within the purview of this act*."

"succumb to the primacy of the Michigan Constitution." *AFSCME Council 25*, 292 Mich App at 95. Because the 1999 amendment excluding prisoners from protection under the ELCRA is incongruous with the directives contained in Const 1963, art 1, § 2, it violates the Michigan Constitution and cannot stand.[10] Where the ratifiers saw fit to extend the protections under Const 1963, art 1, § 2, to "any person," the Legislature was without authority to enact legislation denying those protections to a particular group of individuals. See *AFSCME Council 25*, 292 Mich App at 93, 95.

To this end, the instant situation is analogous to our Supreme Court's decision in *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83; 803 NW2d 674 (2011). That case concerned whether MCL 211.34c(6) could prevent aggrieved parties from appealing a decision of the state tax commission regarding classification decisions. *Id*. at 87-88. The constitutional provision at issue, Const 1963, art 6, § 28, guaranteed judicial review of administrative decisions—assuming the administrative decision met certain requirements—and provided that those decisions "shall be subject to direct review by the courts *as provided by law*." (Emphasis added.) The defendants in that case argued that the "as provided by law" language meant that the Legislature could implement limited judicial review. *Midland Cogeneration*, 489

[10] In this regard, it matters not whether prisoners, although they are excluded from the protections of the ELCRA, can obtain injunctive or declaratory relief for certain civil rights violations under Const 1963, art 1, § 2. Instead, what matters is what the Constitution *requires*—that the Legislature enact statutes protecting the civil rights of all—and what the Legislature *did*—it enacted statutes protecting the civil rights of all, *except for prisoners*. The decision to exclude prisoners violated the "any person" mandate and is unconstitutional.

Mich at 93. This Court agreed. See *Iron Mt Info Mgt, Inc v State Tax Comm*, 286 Mich App 616, 621; 780 NW2d 923 (2009). However, our Supreme Court reversed, holding that while "as provided by law" meant that the Legislature could enact legislation as to the *manner* in which judicial review occurred, it could not preclude judicial review entirely, as judicial review was mandated by the Constitution. *Midland Cogeneration*, 489 Mich at 94. The Court held that "[t]he Legislature may not eradicate a constitutional guarantee in reliance on the language" in the same constitutional amendment granting certain implementation authority to the Legislature. *Id*. Further, the Court explained that the implementing language at issue in that case did "not grant the Legislature the authority to circumvent the protections that the section guarantees. If it did, those protections would lose their strength because the Legislature could render the entire provision mere surplusage." *Id*. at 95.

Turning back to the instant case, the Legislature is not permitted, pursuant to the implementation language contained in Const 1963, art 1, § 2, to define the persons to whom civil rights are guaranteed. The Constitution already answers that question, unequivocally guaranteeing that legislation to protect civil rights must be extended to all, without reservation or limitation. Any implementation language contained in Const 1963, art 1, § 2 should not be construed as giving the Legislature "the authority to circumvent the protections that the section guarantees." See *Midland Cogeneration*, 489 Mich at 95. If it did, just as the Court cautioned in *Midland Cogeneration*, the protection of "any person" would "lose [its] strength" and the Legislature would render such protection meaningless. See *id*. Consequently, I would hold that the 1999

amendment, by eradicating a constitutional guarantee, violates Const 1963, art 1, § 2.

Moreover, our Supreme Court in *Sharp v Lansing*, 464 Mich 792; 629 NW2d 873 (2001), has recognized that the implementation mandate found in Const 1963, art 1, § 2 does not confer discretion on the Legislature to change the mandated protections found in article 1, § 2. Despite the fact that it was given authority to *implement* the constitutional protections at issue, the Legislature was not given authority to *define* those protections in a manner that was inconsistent with the Constitution.

> While the second sentence of art 1, § 2 commits its affirmative "implementation" to the Legislature, the first sentence of this constitutional provision commands that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin." The duty imposed on the Legislature by the second sentence of art 1, § 2 to *implement* art 1, § 2 is not a power to ultimately *define* the substantive meaning of the first sentence. [*Sharp*, 464 Mich at 801-802.]

Here, the Legislature went beyond its authority to implement article 1, § 2 by "appropriate legislation" and attempted to define the meaning of the constitutional mandate by narrowing the scope of protected individuals. Where the Constitution mandated that the Legislature was to provide "by appropriate legislation" certain protections to everyone, without reservation or limitation, the Legislature was not justified in excluding some from that protection.

As further illustration of the constitutional violation occasioned by the 1999 amendment, I compare the instant constitutional provision to Const 1963, art 4,

§ 52, which provides for the preservation of natural resources and requires the Legislature to take action to do so:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. *The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction*. [Emphasis added.]

"[I]t is clear that [the second sentence of art 4, § 52] must be read as a mandatory command to the Legislature." *State Hwy Comm v Vanderkloot*, 392 Mich 159, 180; 220 NW2d 416 (1974) (opinion by WILLIAMS, J.). See also *Genesco, Inc v Mich Dep't of Environmental Quality*, 250 Mich App 45, 54; 645 NW2d 319 (2002) (recognizing that the duty imposed on the Legislature to protect the state's natural resources is mandatory).[11] Consider the following hypothetical situations. Consistent with the mandate in Const 1963, art 4, § 52, could the Legislature decide that the protection of water and other natural resources was desirable, but deem the protection of air too inconvenient, and enact legislation stating that there were to be no regulations as to air quality or air pollution? Or, for that matter, could the Legislature decide to protect air, water, and natural resources from destruction, but enact legislation stating that there was to be no regulation, whatsoever, with regard to the pollution of those same resources? Surely no one would argue that these hypothetical legislative enactments would be constitutional, as they clearly violate the constitutional mandate set forth in

[11] To comply with this constitutional provision, the Legislature enacted what is now known as the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. See *Genesco*, 250 Mich App at 54.

Const 1963, art 4, § 52. Yet, that is precisely what has occurred in this case. In enacting the 1999 amendment to the ELCRA, the Legislature has declined to honor the entire constitutional mandate found in Const 1963, art 1, § 2.

As a result, I would hold that the 1999 amendment to the ELCRA is unconstitutional. I would affirm the trial court's ruling, albeit for the reasons stated above rather than finding that the statute violates equal protection guarantees. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning."). Given this conclusion, there is no need to evaluate the exclusion of prisoners from the scope of the ELCRA on equal protection grounds.[12] The analysis of the constitutionality of the 1999 amendment should begin with the directive given to the Legislature in Const 1963, art 1, § 2 and end with the conclusion that the 1999 amendment is constitutionally infirm because it is contrary to the directive contained in article 1, § 2. See *Midland Cogeneration*, 489 Mich at 94; *AFSCME Council 25*, 292 Mich App at 93.

III. EQUAL PROTECTION

While I find it unnecessary to perform an equal protection analysis, I would agree with the trial court that the 1999 amendment, even assuming it did not violate the constitutional authority conferred upon the Legislature, amounted to an equal protection violation.

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[12] Nevertheless, as discussed later in this opinion, I would conclude that the amendment cannot withstand an equal protection challenge.

"Equal protection is guaranteed under the federal and state constitutions[.]" *Morales v Parole Bd*, 260 Mich App 29, 49; 676 NW2d 221 (2003), citing US Const, Am XIV and Const 1963, art 1, § 2. The Equal Protection Clause requires that all persons similarly situated be treated alike under the law; it does not guarantee that people in different circumstances will be treated the same. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010); *In re Parole of Hill*, 298 Mich App 404, 420; 827 NW2d 407 (2012). "Courts apply one of three tests when reviewing a party's challenge of a legislative classification as violative of equal protection. Which test applies depends on the type of classification made by the statute and the nature of the interest affected." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 469; 639 NW2d 332 (2001). Because the legislation at issue neither infringes a fundamental right nor involves a suspect class or quasi-suspect class, rational-basis review applies. *Shepherd Montessori*, 486 Mich at 318-319.

A. SIMILARLY SITUATED

As a threshold matter, I would find that plaintiffs, who are prisoners, are similarly situated to nonprisoners in regard to the legislation at issue concerning the protection of a person's civil rights. "In typical equal protection cases, plaintiffs generally allege that they have been arbitrarily classified as members of an identifiable group." *Davis v Prison Health Servs*, 679 F3d 433, 441 (CA 6, 2012) (citation and quotation marks omitted). See also *Engquist v Oregon Dep't of Agriculture*, 553 US 591, 601; 128 S Ct 2146; 170 L Ed 2d 975 (2008). Plaintiffs, as an identifiable group, i.e.,

prisoners,[13] are being treated differently than nonprisoners. The question then becomes: are prisoners and nonprisoners similarly situated? This inquiry does not focus on whether the two groups are similarly situated in general, nor is it relevant whether courts have found that prisoners and nonprisoners are not similarly situated in different, unrelated contexts.[14] Rather,

[13] This Court has, in rejecting the assertion that state prisoners are a suspect class, treated prisoners as an identifiable group for purposes of equal protection claims. See *People v Groff*, 204 Mich App 727, 731; 516 NW2d 532 (1994).

[14] In concluding that plaintiffs, as prisoners, are not similarly situated to nonprisoners, the majority opinion cites several cases in support of its conclusion. However, the analysis in those cases involved issues that were quite different from the issue in the case at bar, and I find those cases do not resolve the "similarly situated" issue here. For instance, the majority cites *Samson v California*, 547 US 843, 848; 126 S Ct 2193; 165 L Ed 2d 250 (2006), and *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984); however, those cases simply stated that prisoners—or probationers in the case of *Samson*—do not enjoy the same liberties as the average citizen does. The other cases cited by the majority pertained to issues that are unrelated to the challenged governmental action in this case. See *Niemic v UMass Correctional Health*, 89 F Supp 3d 193 (D Mass, 2015) (finding that prisoners were not similarly situated to nonprisoners for purposes of administering certain medical treatment); *Pratt v GEO Group, Inc*, 802 F Supp 2d 1269, 1272 (WD Okla, 2011) (declaring that prisoners were not similarly situated to nonprisoners for purposes of applying the statute of limitations to certain claims); *Hertz v Carothers*, 174 P3d 243, 248 (Alas, 2008) (prisoners were not similarly situated to nonprisoners for purposes of certain filing fees); *McGuire v Ameritech Servs, Inc*, 253 F Supp 2d 988, 1001 (SD Ohio, 2003) (prisoners and nonprisoners were not similarly situated for purposes of claims relating to collect telephone calls between prisoners and nonprisoners); *Smith v Corcoran*, 61 Fed Appx 919 (CA 5, 2003) (prisoners not similarly situated to nonprisoners for purposes of a claim that the postal inspector unjustly refused to investigate the plaintiff's claim of mail tampering); *Roller v Gunn*, 107 F3d 227, 234 (CA 4, 1997) (prisoners and nonprisoners not similarly situated with regard to the payment of certain filing fees); *Rudolph v Cuomo*, 916 F Supp 1308, 1323 (SD NY, 1996) (prisoners were not similarly situated to nonprisoners for purposes of obtaining an indigency waiver for Motor Vehicle and Parks laws on surcharges);

"[t]he similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group *for purposes of the challenged government action*." *Klinger v Dep't of Corrections*, 31 F3d 727, 731 (CA 8, 1994) (emphasis added). Hence, the issue is whether plaintiffs are similarly situated to nonprisoners in regard to their entitlement to civil rights protection and the ability to seek redress from the government for civil rights violations. This inquiry requires consideration of whether plaintiffs are similar to nonprisoners "in all relevant respects," but does not require that plaintiffs are identical to nonprisoners in all respects. See *Nordlinger v Hahn*, 505 US 1, 10; 112 S Ct 2326; 120 L Ed 2d 1 (1992) (stating that the Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike").

Although it is axiomatic that prisoners and nonprisoners are not similarly situated in every respect, I would find that, for purposes of the challenged governmental action in this case, they are similarly situated

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Scher v Chief Postal Inspector, 973 F2d 682, 683-684 (CA 8, 1992) (prisoners not similarly situated to nonprisoners for purposes of complaints about mail tampering); *Hrbek v Farrier*, 787 F2d 414, 417 (CA 8, 1986) (prisoners were not similarly situated to nonprisoners with regard to a claim that prison officials' withholding of a portion of wages earned by an inmate on work release).

Lastly, I find the primary Michigan case on which the majority relies, *People v Maxson*, 181 Mich App 133; 449 NW2d 422 (1989), to be distinguishable. Contrary to the majority's conclusions, I find that the entitlement to civil rights while receiving services from the government is markedly different, for constitutional purposes, from a situation concerning whether prisoners and nonprisoners are similarly situated in respect to a prosecutor's decision about whether to prosecute the possession of metallic knuckles. One involves certain rights that are otherwise guaranteed to all, and the other involves the allocation of prosecutorial resources being weighed against internal prison disciplinary decisions.

in all relevant respects. I see no reason why prisoners are any different in regard to their entitlement to a remedy for civil rights violations. Just like nonprisoners, prisoners are interacting with and receiving *at least some level* of services from the government on a regular basis. For instance, prisoners receive food, shelter, protection, discipline, at times medical care, and a host of other benefits from the government. See *Johnson v Wayne Co*, 213 Mich App 143, 152; 540 NW2d 66 (1995) (opinion by JANSEN, J.) ("The Eighth Amendment imposes duties on prison officials to provide humane conditions of confinement, ensure that inmates receive adequate food, shelter, and medical care, and take reasonable measures to guarantee the safety of the inmates.").[15] See also *Neal II*, 232 Mich App at 736-737. Nothing about the nature of their confinement suggests that prisoners should be treated any differently than nonprisoners with regard to civil rights protections. It has never been argued in this case that there are any safety justifications for treating prisoners and nonprisoners differently in regard to their ability to claim protections to civil rights. Nor do any such safety concerns seem apparent in this case. In short, prisoners and nonprisoners are similar with respect to their entitlement to civil rights protections in their interactions with the government. Therefore, I would find that, for purposes of claiming redress for violation of their civil rights, prisoners are similarly situated to nonprisoners in regard to receiving certain benefits and services from the state.

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[15] In fact, one could argue that the average prisoner has far more encounters with government actors on a daily basis than does the average citizen. Prisoners' entire existence in prison is dependent upon and supported by government actors. Thus, in comparison to nonprisoners, prisoners have far more potential encounters during which they need the protections of the ELCRA.

Defendants argue, and the majority agrees, that because prisoners receive services and benefits from the government involuntarily, by virtue of the fact that their incarceration is not voluntary, they are not similarly situated to nonprisoners. While it is true that, but for involuntary confinement mandated by the state, prisoners would not be inclined to take residence inside prison walls, I do not believe that the involuntary receipt of services changes the equation. That is, I do not agree that those who involuntarily interact with the government are any less deserving of the right to protection of their civil rights and a remedy for violations upon those rights than those who voluntarily do so. To this end, I would note that nearly all citizens are compelled, at times, to receive public services in a manner that is somewhat less than voluntary. For instance, children under a certain age are compelled to attend school,[16] to some degree, yet no one would dispute that children receive public services while they attend public school. Likewise, litigants may be required, subject to the court's contempt powers, to appear at certain court proceedings, but no one would contend that they do not receive public services simply by virtue of the fact that their presence in court was not entirely voluntary. And, for that matter, most trips to the Secretary of State offices are not entirely voluntary. For example, if left to their own accord, most citizens would likely not find it convenient or necessary to register and pay taxes on a newly purchased motor vehicle or boat; rather, they do so because the state requires them to do so. Along a similar vein, prisoners reside in prison and receive certain services therein because the state mandates that they do so. Further-

[16] See MCL 380.1561, outlining compulsory school attendance as well as certain exceptions.

more, even assuming that prisoners were the only ones who received public services in a manner that was less than voluntary, I fail to see any reason why this prevents prisoners from being similarly situated to nonprisoners in regard to their entitlement to civil rights. Regardless of whether the receipt of services is voluntary or involuntary, the fact remains that all citizens are in a position where they expect, rightfully, to have certain civil rights honored in their respective dealings with the government.[17] Thus, in my view, prisoners and nonprisoners are similarly situated with regard to their entitlement to civil rights in dealings with the government because, regardless of a person's abode—either behind bars and concrete blocks or in a two-story colonial—he or she is still entitled to basic civil rights that are otherwise guaranteed to all.

B. RATIONAL BASIS REVIEW

Because I would find that plaintiffs, as prisoners, are similarly situated to nonprisoners for purposes of the challenged legislation, the salient inquiry becomes whether the classification drawn in this case can withstand rational-basis review. "Under the rational basis test, the challenged legislation 'is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption.' " *Parole*

[17] I acknowledge that prisoners do not enjoy all the rights of nonprisoners. For example, prisoners are subject to having all telephone calls and other communications monitored, are subject to searches and seizures without a warrant, and have various other freedoms curtailed for purposes of safety and other legitimate reasons. Nevertheless, I do not believe that this changes the equation. The pertinent analysis concerns not whether prisoners and nonprisoners are similarly situated with regard to those freedoms; instead, the analysis concerns whether the two groups are similarly situated for purposes of seeking redress for civil rights violations. I see no meaningful reason to treat the groups differently for that purpose.

of Hill, 298 Mich App at 421, quoting *People v Idziak*, 484 Mich 549, 570; 773 NW2d 616 (2009). "Specifically, '[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute.' " *Parole of Hill*, 298 Mich App at 422, quoting *Idziak*, 484 Mich at 570-571. Rational-basis review "is a paradigm of judicial restraint" and "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Fed Communications Comm v Beach Communications, Inc*, 508 US 307, 313; 113 S Ct 2096; 124 L Ed 2d 211 (1993). Indeed, rational-basis review acknowledges that

> [m]ost laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. [*Personnel Admin of Massachusetts v Feeney*, 442 US 256, 271-272; 99 S Ct 2282; 60 L Ed 2d 870 (1979).]

Nevertheless, the United States Supreme Court has cautioned, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v Doe*, 509 US 312, 321; 113 S Ct 2637; 125 L Ed 2d 257 (1993). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Texas v Cleburne Living Ctr*, 473 US 432, 446; 105 S Ct 3249; 87 L Ed 2d 313 (1985). When a right is afforded, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v Normet*, 405 US 56, 77; 92 S Ct 862;

31 L Ed 2d 36 (1972). "Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests." *City of Cleburne*, 473 US at 446-447 (citation, quotation marks, and ellipsis omitted). See also *United States v Windsor*, 570 US ___; 133 S Ct 2675, 2693; 186 L Ed 2d 808 (2013); *US Dep't of Agriculture v Moreno*, 413 US 528, 534; 93 S Ct 2821; 37 L Ed 2d 782 (1973).

C. THE CHALLENGED LEGISLATION LACKS A RATIONAL BASIS

Even under the deferential rational-basis standard, I would hold that the classification drawn in this case, which prevents prisoners, but no one else, from seeking relief under the ELCRA, violates equal protection. Like the court in *Mason v Granholm*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 23, 2007 (Docket No. 05-73943),[18] my reasoning on this issue is guided by the Supreme Court's decision in *Romer v Evans*, 517 US 620; 116 S Ct 1620; 134 L Ed 2d 855 (1996). At issue in *Romer* was an amendment to the Colorado Constitution, "Amendment 2," which prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual individuals. *Id*., 517 US at 623-624. The Court held that Amendment 2 failed rational-basis review for two reasons. First, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legisla-

[18] Plaintiffs argue that this Court is bound by the decision in *Mason*. I believe the majority accurately concludes that we are not bound by an unpublished federal district court decision. The majority also correctly concludes that the application of offensive nonmutual collateral estoppel is not appropriate in this case.

tion." *Id*. at 632. The amendment was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id*. at 633. The Court explained that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id*. (citations and quotation marks omitted).

> Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. [*Id*.]

As for the second reason identified by the *Romer* Court for concluding that Amendment 2 failed rational-basis review, the Court found that the "sheer breadth" of the amendment was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ." *Id*. at 632. If the concept of equal protection was to mean anything, reasoned the Court, " 'it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id*. at 634, quoting *Moreno*, 413 US at 534. The classification in that case could not be explained by any of the proffered rationales; thus, Amendment 2 did not bear a rational relationship to a legitimate governmental purpose. *Romer*, 517 US at 635.

Similarly, where the 1999 amendment falls short is that it paints with far too broad a brush. It targets a specific group—prisoners—and prevents that group, and only that group, from filing claims under the ELCRA. As recognized in *Romer*, 517 US at 633,

"[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." It is for that reason that a law singling out a particular class and imposing hardships on that class "is itself a denial of equal protection of the laws in the most literal sense." *Id*. Here, the law imposes a hardship—no statutory relief for civil rights violations—on only one group. The decision to single out this particular group and categorically deny prisoners, and only prisoners, the ability to seek relief renders the constitutionality of the 1999 amendment doubtful from the onset. See *id*.

Further, just as in *Romer*, this targeted classification bears no rational relationship to a legitimate governmental interest. Two primary rationales have been advanced for justifying the classification at issue: (1) maintaining prison order and (2) preventing frivolous actions and preserving the public fisc. As to the first proffered rationale, I agree with the majority's conclusion that there is no merit to defendants' assertion that the challenged statute is rationally related to the legitimate governmental interest of prison order and management. There does not appear to be any connection between limiting a prisoner's ability to seek relief under the ELCRA and maintaining prison order.

Where I diverge from the majority opinion is in the conclusion that the second offered purpose—deterrence of frivolous and meritless lawsuits and maintaining the public fisc—does not suffice as a rational basis in this case. There is no doubt that deterring frivolous lawsuits is designed to and does protect the public fisc, and that doing so is a legitimate government purpose. See *Barlett v North Ottawa Comm Hosp*, 244 Mich App 685, 695; 625 NW2d 470

(2001) ("Deterring the filing of frivolous lawsuits against any party or group is a legitimate governmental interest."). Also, it is well established that prisoners, as a group, tend to file more litigation than nonprisoners. See, e.g., *Johnson v Daley*, 339 F3d 582, 592 (CA 7, 2003). The proper inquiry is whether the ends in this case legally justify the means. In other words, is the connection between preventing frivolous lawsuits by prisoners and maintaining the public fisc and the decision to deny an identifiable class of individuals protections under the ELCRA—an act designed to protect the civil rights of all persons—so attenuated that the classification is arbitrary? Given the sweeping prohibitions drawn by the classification at issue and that it completely severs the rights of inmates to seek redress for violations of civil rights—rights which are regarded as those that should be given the "highest priority," in terms of protection, see *Barczak v Rockwell Int'l Corp*, 68 Mich App 759, 763; 244 NW2d 24 (1976)—I find the restriction arbitrary and contrary, if not repugnant, to the ideals of equal protection. The only discernible purpose of the 1999 amendment is to snuff out all lawsuits filed by prisoners.

Indeed, rather than targeting frivolous claims, the only purpose of the 1999 amendment is the elimination of prisoners' ability to bring claims of *any kind* under the ELCRA and to limit the state's liability in civil rights claims by prisoners. This cannot serve as a legitimate government purpose. See *Johnson*, 339 F3d at 612 (Rovner, J., dissenting) (addressing the federal PLRA) ("The government . . . does not and cannot argue that Congress has a legitimate interest in discouraging meritorious litigation by inmates."). See also *Rodriguez v Brand West Dairy*, 2015 NM App 097; 356 P3d 546 (2015) (holding that a New Mexico statute

that excluded farm and ranch laborers from the scope of workers' compensation coverage violated equal protection because the classification drawn was arbitrary and not rationally related to the goal of preserving resources); *Willoughby v Washington Dep't of Labor & Indus*, 147 Wash 2d 725, 737; 57 P3d 611 (2002) (invalidating, on equal protection grounds, a statute that barred the distribution of industrial insurance permanent partial disability benefits to prisoners because the statute was unrelated to a legitimate governmental purpose and "saving money is not a sufficient ground for upholding an otherwise unconstitutional statute in any event"). There is simply no effort in the 1999 amendment to target frivolous claims; rather, the amendment is a blunt and obtuse prohibition on all claims, regardless of merit, under the ELCRA. Although "equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety,' " the classification drawn in this case is more than merely imprecise, "it is wholly without any rational basis." *Moreno*, 413 US at 538. See also *Mason*, unpub op at 7 (concluding that the 1999 ELCRA amendment was "too broad to be rationally related to" the asserted governmental interests of "deterring frivolous suits and protecting the public treasury"). In my view, the 1999 amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 US at 632.[19]

[19] The majority cites cases such as *Morales*, 260 Mich App at 52 (holding that legislation precluding prisoners from appealing the decision of the parole board was rationally related to the legitimate governmental interest in saving funds in response to frivolous requests by prisoners), and *Proctor*, 248 Mich App at 469 (no equal protection

In addition, I find it significant that, independent of the 1999 amendment, the Legislature had already enacted several, more targeted statutes designed to ferret out frivolous prison litigation. These more targeted statutes are found in the PLRA, and include, among others, the pleading requirements discussed in Part I of this opinion, MCL 600.5507; the exhaustion of

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violation in the Legislature's decision to single out incarcerated prisoners with regard to FOIA exclusions, based on the conclusion that prisoners often file frivolous requests). I find these cases to be unavailing. Initially, the rational-basis analysis in both cases was rather cursory, as *Proctor*, 248 Mich App at 469, summarily concluded "that the Legislature's FOIA exclusions singling out incarcerated prisoners rationally relate to the Legislature's legitimate interest in conserving the scarce governmental resources squandered responding to frivolous FOIA requests by incarcerated prisoners." The pertinent analysis in *Morales* was similarly short, as the opinion cited *Proctor* and concluded that "the exclusion of prisoners' ability under MCL 791.234 to appeal parole denials is rationally related to the Legislature's legitimate interest in saving public funds in response to innumerable frivolous requests by incarcerated prisoners for the review of the Parole Board's denials of parole." *Morales*, 260 Mich App at 52. Moreover, the statutes at issue in both cases were significantly different from the 1999 amendment to the ELCRA. Notably, the ELCRA places an outright ban on *all* prisoner actions under the ELCRA, a ban that is contrary to the constitutional directive contained in Const 1963, art 1, § 2. By contrast, *Morales* dealt with parole, which is not a right to which prisoners are entitled. And the prisoners in *Morales* were afforded *at least some* review of their parole eligibility, as the parole board had to first make a determination as to eligibility; here, by comparison, the 1999 amendment cuts off all review from the outset. As to *Proctor*, I would not consider the denial of a FOIA request to be of the same importance as the denial of an individual's ability to seek redress for a violation of constitutionally guaranteed civil rights. Moreover, I would note that the existence of the PLRA makes the instant case different from both *Morales* and *Proctor*. That is, the PLRA is already a targeted attempt at curtailing frivolous prisoner litigation with regard to prison conditions. The statutes at issue in *Morales* and *Proctor* lacked this type of aggressive safeguard against frivolous actions. Thus, unlike the statutes at issue in *Morales* and *Proctor*, the likelihood that the 1999 amendment was rationally related to the asserted interest of curtailing frivolous actions is significantly lessened.

administrative remedies, MCL 600.5503(1); and various screening provisions that call for dismissal set forth in the PLRA, including those that impose a duty on courts to review complaints and dismiss frivolous claims, such as MCL 600.5503(2), MCL 600.5505(2), and MCL 600.5509(1) and (2), as well as the list maintained by the state court administrator's office of the frivolous civil actions brought by prisoners concerning prison conditions, MCL 600.5529. "The existence of these provisions necessarily casts considerable doubt upon the proposition" that the 1999 amendment "could rationally have been intended to prevent those very same" concerns. See *Moreno*, 413 US at 536-537 (explaining that where other safeguards in the Food Stamp Act already existed, the challenged provision, which excluded from eligibility for food stamps those individuals who resided with nonrelatives, was not rationally related to a legitimate governmental purpose and instead was arbitrary). Given the existence of the much more targeted safeguards in the PLRA, it is dubious whether the 1999 amendment was intended to target frivolous claims.

Defendants attempt to rationalize the prohibition placed on prisoners' abilities to bring claims under the ELCRA by arguing that prisoners can still seek injunctive and declaratory relief under the Constitution for civil rights violations; therefore, according to defendants, the classification is permissible. At first glance, this argument has some appeal, but upon further inquiry, it is found to be wanting.[20] The argument removes the focus from the proper inquiry in this case.

[20] I also note that from a practical standpoint, prisoners who cannot afford to fund their own lawsuit seeking declaratory or injunctive relief would be hard-pressed to find anyone but a pro bono or nonprofit attorney willing to take their case; other than pursuing a case *in propria persona*, the lack of financial redress effectively limits a prisoner's

The pertinent inquiry is not concerned with what *other* avenues of relief are available to prisoners. Rather, the salient concern focuses on the classification drawn in the statute at issue and whether that classification is wholly arbitrary or whether it is rationally related to a legitimate governmental interest. See *Baxstrom v Herold*, 383 US 107; 86 S Ct 760; 15 L Ed 2d 620 (1966) (focusing on the classification drawn, not external concerns).[21] And, as noted earlier, I would conclude that the classification is not rationally related to a legitimate governmental interest.

I find the classification drawn in this case particularly troubling in light of the constitutional mandate established in Const 1963, art 1, § 2, which is emphasized and discussed in detail in Part II of this opinion. The Constitution prohibits discrimination against "any person," and requires the Legislature to implement that directive. In enacting the 1999 amendment at issue, the Legislature, rather than honoring that man-

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access to the courthouse in seeking to enforce his or her constitutional rights. And again, it is only prisoners who are carved out from relief under the ELCRA.

[21] I find it particularly troubling that the Legislature would choose to preclude monetary relief for something as significant as civil rights violations. Civil rights actions have long been recognized as significant, not only for the litigants but for the public at large. See, e.g., *Rivera*, 477 US at 574. Not only that, but a damages remedy has been recognized as an integral component of remedying civil rights violations. See *Owen v City of Independence, Mo*, 445 US 622, 651; 100 S Ct 1398; 63 L Ed 2d 673 (1980) ("A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed."); *Davis v Passman*, 442 US 228, 245; 99 S Ct 2264; 60 L Ed 2d 846 (1979). Further, damages have been recognized as "particularly beneficial" in cases such as this one that allege "those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials . . . ." *Owen*, 445 US at 652.

date as to "any person," has spurned an identifiable group of individuals. The mandate did not say "all to whom you feel like giving the privilege"; it said "all" without limitation. In this respect, the legislation is nothing but a targeted curtailment of the rights of prisoners to seek the very same relief that all others enjoy. This targeted curtailment of the right of prisoners to seek the very same relief that is available to all others appears, in my mind, so incongruous with the purpose of legislation that was designed to protect civil rights that it is capricious and unrelated to any legitimate governmental purpose. See *Windsor*, 570 US at ___; 133 S Ct at 2693, quoting *Moreno*, 413 US at 534 ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."); *Moreno*, 413 US at 534 ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). See also *Mason*, unpub op at 7-8 (noting that "[t]he ELCRA amendment denies prisoners the basic protections against discrimination that all others are afforded under Michigan law, *as required by*" Const 1963, art 1, § 2, and concluding that "[t]here is no rational basis for denying *all* prisoners . . . — and no one else — the ability to seek redress for illegal discrimination that occurred in prison"). Thus, in addition to demonstrating that the 1999 amendment is unconstitutional because it contravenes the Legislative mandate, the betrayal of the mandate also illustrates the capriciousness of the amendment, thereby eroding the asserted rational basis for the legislation.

I am also troubled by the implications of the majority's decision. The 1999 amendment provides no avenue for monetary relief, and, potentially, no redress whatsoever under state law for any type of discrimination not articulated in Const 1963, art 1, § 2, e.g., discrimination based on age, sexual orientation, marital status, or gender. With no threat of a monetary judgment, or, perhaps in some cases, any judgment at all, no state law would stand in the way of prisons and prison officials intentionally discriminating against prisoners in ways that would be prohibited in all other walks of life. For instance, the majority's decision would provide no remedy under state law if prison officials, with no consideration of security concerns or other penological interests, simply denied certain services or benefits, such as educational classes, exercise time, or countless others, to certain classifications of prisoners. And, for that matter, there would be no damages available under the ELCRA if prison officials drew those classifications based on prisoners' race. And the majority's decision would provide no remedy under state law against sexual harassment—a type of sexual discrimination, per MCL 37.2103(i), under the ELCRA. In other words, prison guards and other officials could perpetuate sexual harassment that would, in all other walks of life, be unquestionably banned by the ELCRA, and, by some twisted sense of irony, be insulated from liability under state law by the very same act. As pointed out by plaintiffs, the 1999 amendment only applies to those serving a sentence of imprisonment. Thus, guards and prison officials could sexually harass inmates and face no liability under state law, but face liability under the ELCRA for the very same conduct if it were committed against a visitor to the prison, rather than an inmate. The simple, arbitrary fact that one victim in this scenario wore an orange jumpsuit

and the other wore street clothes would insulate the guards and prison officials under the ELCRA. This, in my mind, highlights the capricious nature of the 1999 amendment and why it cannot withstand even the most deferential rational-basis review. See *City of Cleburne*, 473 US at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). See also *Baxstrom*, 383 US at 115 ("The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the" benefit at issue was withheld only in regard to certain incarcerated individuals). The ELCRA, an act designed to protect civil rights, should not be used as a safe harbor against claims of sex discrimination—or any type of discrimination for that matter.

The implications of the majority's decision are even more troubling in light of the fact that it would completely bar, regardless of the merits of the case, any liability on the part of the state for the conduct alleged in this case, which was an ongoing and well-documented problem.[22] The conduct alleged in this case, sexual assaults committed against young inmates, is not a new or unheard-of problem. The federal Prison Rape Elimination Act (PREA), 42 USC 15601(4), enacted in 2003, expressly recognized this very issue, stating that "[y]oung first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration." While, for the past 12 years, the federal government has been aware of and attempting to eradicate the very problem alleged to

[22] This should not be viewed as a substantive evaluation of the merits of plaintiffs' claims in the instant case.

have occurred in this case—the sexual assault of juvenile prisoners—Michigan has been trying to eliminate the rights of juveniles—and other prisoners—to seek monetary relief for this and other civil rights violations. I cannot, in good conscience, countenance this attempt at shirking liability and responsibility.

In sum, although I find that the issue need not be reached because the unconstitutionality of the 1999 amendment is apparent for the reasons discussed in Part II of this opinion, I would conclude that the amendment violates equal protection because it draws a classification between similarly situated individuals and that classification is not rationally related to a legitimate governmental interest.

IV. REMAINING ARGUMENTS

Lastly, defendants argue that the trial court should have granted their motion for summary disposition under MCR 2.116(C)(8), claiming that plaintiffs failed to adequately allege that they had notice of the conduct at issue.[23] This Court reviews de novo motions for summary disposition. *Citimortgage, Inc v Mtg Electronic Registration Sys, Inc*, 295 Mich App 72, 75; 813 NW2d 332 (2011). Summary disposition is proper under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663,

[23] Defendants raised this argument before the trial court, but the court did not rule on the matter. Because the issue was preserved by virtue of defendants having raised it before the trial court, see *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011), and because I would remand for dismissal without prejudice, see Part I of this opinion, I find it necessary to weigh in on defendants' argument.

672; 719 NW2d 1 (2006). A reviewing court on a (C)(8) motion "must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 131; 839 NW2d 223 (2013). In addition, a court must construe all well-pleaded allegations in a light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). "A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (citation and quotation marks omitted).

Plaintiffs brought claims under the ELCRA against defendant for sex discrimination (hostile environment) and age discrimination. Defendants do not address plaintiffs' claims individually; instead, they argue that plaintiffs' claims must fail because they lacked notice of the alleged harassment. In addition, defendants' arguments only appear to pertain to plaintiffs' claims about sex discrimination. Accordingly, I only evaluate defendants' arguments as to the claims of sex discrimination.

Under the ELCRA, discrimination on the basis of sex, which includes, by definition, sexual harassment, is prohibited. MCL 37.2103(i). The act defines sexual harassment to include

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

The last category is at issue in this case; this type of harassment "is commonly labeled hostile environment harassment." *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000).

To establish hostile environment harassment, a plaintiff in a case such as this one must prove:

> (1) the [plaintiff] belonged to a protected group;
>
> (2) the [plaintiff] was subjected to communication or conduct on the basis of sex;
>
> (3) the [plaintiff] was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the [plaintiff's public services or created a hostile environment with regard to those public services]; and
>
> (5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

At issue in this case is the fifth element, respondeat superior. Plaintiffs seek to hold defendants vicariously liable for acts committed by their respective agents. In a hostile environment claim, an employer may avoid liability for hostile environment harassment if, upon notice of the alleged harassment, it adequately investigated and took prompt and appropriate remedial

action. *Id*. at 396. Thus, a defendant must have actual or constructive notice of the alleged harassment before liability will attach. *Sheridan v Forest Hills Pub Schs*, 247 Mich App 611, 621; 637 NW2d 536 (2001). A plaintiff can demonstrate notice if he or she complained to "higher management" about the harassment, or "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id*. (citation and quotation marks omitted). "[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich at 319.

Taking the allegations raised in plaintiffs' complaint as true and construing them in a light most favorable to plaintiffs, as is required under MCR 2.116(C)(8) review, see *Johnson*, 491 Mich at 435; *Gorman*, 302 Mich App at 131, I would find that defendants were not entitled to summary disposition because factual development could possibly justify recovery on plaintiffs' sexual harassment claims. Most notably, I find that because of the pervasiveness of the harassment and sexual violence alleged, plaintiffs sufficiently pleaded knowledge on the part of defendants that a hostile environment existed at each of the facilities. Plaintiffs raised numerous allegations of abuse at all of the correctional facilities. These allegations included claims that some of the plaintiffs were repeatedly and continuously harassed and sexually assaulted by adult male prisoners. Some plaintiffs were harassed and assaulted at multiple Michigan Department of Corrections (MDOC) facilities following transfers. According to plaintiffs' complaint, some of the assaults and harassment occurred in front of MDOC staff members

and were even facilitated at times by MDOC staff opening cell doors to allow prisoners to commit the assaults. The complaint alleged that the assaults were committed in an open and obvious manner, and that there was medical evidence documenting some of the sexual assaults. All of this is in addition to the fact that the complaint alleged that some of the complained-of sexual assaults were perpetrated by MDOC staff members or that MDOC staff members threatened to help facilitate sexual assault against plaintiffs as punishment. These facts, taken in a light most favorable to plaintiffs, show widespread, pervasive sexual assaults at several MDOC facilities.

Furthermore, regarding the harassment perpetrated by adult male prisoners, all of which was alleged to have occurred between the fall of 2010 and December 2013, plaintiffs alleged that the MDOC placed prisoners between the ages of 14 and 17 in adult prisons and that it maintained a policy of placing 17-year-old prisoners in cells with adult prisoners. Plaintiffs also alleged that the MDOC failed to separate juvenile prisoners from adult prisoners in various situations and places, including showers, yards, and eating areas. All of this, despite the fact that the PREA, which was enacted in 2003, was expressly designed to prevent youthful inmates from being "placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters." 28 CFR 115.14(a). Given the directives of the PREA and the allegations that defendants took actions that were contrary to those directives, combined with the pervasiveness of the alleged harassment, I find that plaintiffs sufficiently pleaded facts to establish that defendants had knowledge or should have had knowledge of

a hostile environment in all 10 facilities at issue. See *Chambers*, 463 Mich at 319; *Sheridan*, 247 Mich App at 621. Plaintiffs are not, as defendants contend, trying to hold defendants "strictly liable" for the alleged sexual assaults. Rather, they are, as is demonstrated by their numerous allegations, attempting to hold defendants liable for failing to remedy a hostile environment—an environment that defendants either knew about or should have known about—based on the facts alleged. Defendants were not entitled to summary disposition under MCR 2.116(C)(8). See *Johnson*, 491 Mich at 435.

V. CONCLUSION

Because I am bound by existing precedent interpreting the PLRA, I concur with the majority in regard to the issue of whether dismissal was required under MCL 600.5507(3), although dismissal would be without prejudice. In all other respects, I respectfully dissent from the majority decision. I would affirm the trial court's declaration that the 1999 amendment to the ELCRA is unconstitutional; however, I would do so on the alternative ground that the statutory amendment contravenes the clear and express directive given to the Legislature in Const 1963, art 1, § 2 to protect the civil rights of all persons. I would also hold that the amendment is unconstitutional because it fails the rational-basis test. Finally, I would find that plaintiffs pleaded sufficient claims to survive a motion for summary disposition under MCR 2.116(C)(8).

PEOPLE v STOKES

Docket No. 321303. Submitted September 1, 2015, at Detroit. Decided September 8, 2015, at 9:00 a.m. Leave to appeal sought.

Christopher Wayne Stokes was convicted by jury in the Wayne Circuit Court of carjacking and armed robbery. He was acquitted of the firearms charges against him. The court, Ulysses W. Boykin, J., denied defendant's motion for a new trial and sentenced defendant as a second-offense habitual offender to concurrent terms of 18 to 30 years of imprisonment for each conviction. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by denying defendant's motion for a new trial because defendant failed to show that the jury was exposed to an extraneous influence. After trial, a juror acknowledged that he had conducted an experiment at his home in an attempt to recreate the crime scene, but the juror did not share the results of his experiment with the other jurors. Therefore, the juror who conducted the experiment did not bring into the jury room any evidence not presented in open court, and no extraneous influence was introduced into the jury's deliberations.

2. The prosecution did not violate *Brady v Maryland*, 373 US 83 (1963), because it did not fail to disclose material evidence that would have been favorable to defendant. Defendant claimed that the prosecution failed to provide him with access to his own cell phone from which he could have obtained contact information for the individual who prepared the flyer for the party at which defendant claims he was present at the time of the crimes. Defendant failed to establish that the cell phone was never provided to him or that it was lost, and defense counsel acknowledged that she obtained from another source the information allegedly contained on the cell phone. Defendant further failed to show that the information contained on the phone could have affected the outcome of the trial. Defendant also claimed that the cell phone contained tracking information on his whereabouts at the time of the crime, but he provided no further explanation of the information or why the cell phone was necessary to obtain it.

3. The Michigan Supreme Court, in *People v Lockridge*, 498 Mich 358 (2015), ruled that Michigan's legislative sentencing guidelines scheme was unconstitutional. Although *Lockridge* continued the mandate that trial courts were to use the legislative sentencing guidelines, the *Lockridge* Court ruled that the minimum sentences recommended by the guidelines were to be advisory only. In this case, defendant was acquitted of the firearms charges against him, but the trial court scored OV 1 (aggravated use of a weapon) and OV 2 (lethal potential of weapon possessed or used) as if defendant possessed a gun and pointed it at the victim. Because the scores for OVs 1 and 2 placed defendant at a higher OV level than he would have been placed without the OV 1 and OV 2 scores, defendant's sentence was constrained by the unconstitutional application of the legislative sentencing guidelines as they existed at the time of defendant's sentencing. Remands after *Lockridge* take place according to the procedure outlined in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). A defendant whose sentence violates the rule of *Lockridge* must timely notify the trial court if he or she does not wish to be resentenced. A defendant whose sentence was imposed in violation of *Lockridge* may opt not to be resentenced in light of the fact that the trial court, now unconstrained by the minimum sentences prescribed by the formerly mandatory legislative sentencing scheme, could impose a more severe sentence on a defendant than the sentence originally imposed. If a defendant fails to give timely notice that he or she chooses not to be resentenced, (1) the trial court and counsel must communicate in some form about the defendant's sentence, (2) the court may hold a hearing on the matter, (3) the trial court's decision whether to resentence the defendant must be based only on the circumstances existing at the time the defendant was originally sentenced, (4) the defendant need not be present when the trial court decides whether to resentence the defendant, and (5) the defendant must be present if the trial court decides to resentence him or her.

4. The remand procedure for determining whether to resentence a defendant when the trial court's original sentence may have resulted from the unconstitutional constraint imposed by mandatory adherence to the legislative sentencing guidelines applies to both preserved and unpreserved errors.

5. Defendant's trial counsel was not ineffective for failing to request access to defendant's cell phone until the day of trial because defendant failed to show the materiality of his cell phone and so could not establish any prejudice as a result of his counsel's failure to earlier request access to the cell phone.

Defendant's trial counsel was also not ineffective for failing to request two specific jury instructions. Defense counsel did not request the instruction having to do with evidence of a defendant's flight, and she did not request the alibi instruction. Defendant failed to overcome the presumption that his counsel's decision to not request the flight instruction was sound trial strategy. The prosecution did not place much emphasis on defendant's flight, and giving the instruction would have drawn further attention to evidence that was not favorable to defendant. As for the alibi instruction, defendant relied on an alibi defense, and it is unclear why defense counsel did not request the instruction. However, even if defense counsel's decision was objectively unreasonable, defendant cannot demonstrate a reasonable probability of a different result had the instruction been given to the jury. The absence of an alibi instruction is not error requiring reversal when the trial court, as it did in this case, properly instructs the jury on the elements of the crime charged and the prosecutor's burden of proof. Finally, defense counsel was not ineffective for failing to contest the trial court's jurisdiction over defendant. At no time did the prosecution establish that the crimes occurred in Wayne County, only that the crimes occurred in Detroit. However, a court, at any time in the proceedings, may take judicial notice of a fact generally known in the jurisdiction or that is capable of accurate and ready determination through a reliable source.

6. The trial court abused its discretion by refusing to allow defense counsel, during closing arguments, to identify and implicate another individual in the crimes of which defendant was convicted. Although closing arguments are not the time to argue new evidence, attorneys are permitted to argue all reasonable inferences arising from the evidence admitted at trial. Defense counsel should have been permitted to expressly argue that another named individual committed the crimes. However, the trial court's error did not deprive defendant of his constitutional right to present a complete defense. The evidence defense counsel wished to argue was presented to the jury. Defense counsel argued extensively that defendant was not the individual who committed the crimes and called into question the police's failure to investigate "another male" living with defendant from whom defendant's brother claimed he purchased the victim's cell phone. Although defense counsel was not permitted to mention the other individual's name, her references to "another male" clearly implied the possibility that the other individual committed the crimes.

7. Defendant was not deprived of his right to a fair trial by all the errors he claimed occurred during his trial. Reversal may be required when the cumulative effect of several errors creates sufficient prejudice even when a single error does not. In this case, with the exception of the sentencing error, defendant has shown no prejudice as a result of the other claimed errors.

Convictions affirmed and case remanded for further proceedings regarding defendant's sentences.

1. SENTENCING — LEGISLATIVE SENTENCING GUIDELINES — UNCONSTITUTIONAL IMPOSITION OF MANDATORY MINIMUM SENTENCE — REMAND PROCEDURE.

A defendant is entitled to the remand procedure outlined in *Lockridge* if the trial court relied on judicially found facts not found beyond a reasonable doubt by a jury and not admitted by the defendant to score the defendant's offense variables, and the trial court imposed a sentence within the legislative sentencing guidelines range calculated using those offense variable scores.

2. SENTENCING — LEGISLATIVE SENTENCING GUIDELINES — UNCONSTITUTIONAL IMPOSITION OF MANDATORY MINIMUM SENTENCE — REMEDY.

If a trial court's discretion when sentencing a defendant was unconstitutionally constrained by the minimum sentence mandated by the legislative sentencing guidelines, the defendant is entitled the following procedure: (1) the defendant may elect not to be resentenced by timely notifying the court of that election, (2) if not timely notified, the court must communicate with counsel about the defendant's sentence, (3) the court may hold a hearing on the matter, (4) in deciding whether to resentence the defendant, the court may only consider circumstances existing at the time of the defendant's original sentencing, (5) the defendant need not be present at the time the court makes its decision regarding whether to resentence, and (6) the defendant must be present during resentencing.

3. SENTENCING — LEGISLATIVE SENTENCING GUIDELINES — UNCONSTITUTIONAL IMPOSITION OF MANDATORY MINIMUM SENTENCE — REMEDY — PRESERVATION OF ERROR.

The remand procedure for determining whether to resentence a defendant after a trial court imposed on a defendant a minimum sentence within the minimum sentence range mandated by the legislative sentencing guidelines, when the minimum sentence range was determined based on offense variable scores calculated using judicially found facts not decided beyond a reasonable doubt by a jury or admitted by the defendant, applies to both preserved and unpreserved errors.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amy M. Somers*, Assistant Prosecuting Attorney, for the people.

Lee A. Somerville for defendant.

Christopher Wayne Stokes, *in propria persona*.

Before: TALBOT, C.J., and WILDER and FORT HOOD, JJ.

TALBOT, C.J. Christopher Wayne Stokes appeals as of right his convictions by jury of carjacking[1] and armed robbery.[2] The trial court sentenced Stokes as a second-offense habitual offender[3] to concurrent terms of 18 to 30 years' imprisonment for each conviction. We affirm Stokes's convictions, but remand for further proceedings consistent with this opinion.

I. FACTS

Stokes's convictions arise out of a carjacking that occurred near midnight on July 10, 2013. That night, Charles Jones drove into his driveway in Detroit. Stokes appeared and ordered Jones to hand over his car keys and cell phone. According to Jones, Stokes did so while pointing a pistol at Jones's head. Jones complied, and Stokes fled in Jones's vehicle. Stokes was charged with carjacking, armed robbery, and firearms offenses. At trial, Stokes presented several alibi witnesses. These witnesses generally testified that on the night of the carjacking, Stokes was at a "tattoo

[1] MCL 750.529a(1).

[2] MCL 750.529.

[3] MCL 769.10.

party" at a hair salon in Oak Park.[4] The jury found Stokes guilty of carjacking and armed robbery, but acquitted Stokes of the firearms offenses. Stokes now appeals as of right.

II. DISCUSSION

A. JURY DELIBERATIONS

Stokes argues that he is entitled to a new trial because a juror engaged in misconduct that denied him his right to a fair and impartial trial. We disagree. Stokes raised this issue in a motion for a new trial, which the trial court denied. "A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes."[5] We review de novo a defendant's claim that he or she was denied the Sixth Amendment right to an impartial jury.[6]

After the trial was complete, the attorneys and the judge interviewed the jurors. During this interview, one juror disclosed that he had conducted an experiment in his own home before deliberations were complete. This juror attempted to recreate the crime scene by pointing his own gun at a mirror. Although this juror did not share the results of the experiment with any other juror, Stokes argues that the experiment deprived him of a fair and impartial jury because the experiment influenced this single juror, who contributed to the verdict.

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[4] The witnesses testified that the salon hosted the party from 9:00 p.m. to midnight, and that Stokes was the tattoo artist providing tattoos at the salon.

[5] *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citations omitted; alteration omitted).

[6] *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012).

Consistent with a defendant's right to a fair and impartial jury, "jurors may only consider the evidence that is presented to them in open court."[7] "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment."[8] To establish that the jury was influenced in a manner requiring reversal, a defendant must prove (1) that the jury was exposed to an extraneous influence and (2) that this extraneous influence "created a real and substantial possibility that [it] could have affected the jury's verdict."[9]

In *People v Fletcher*, this Court explained:

> Traditionally, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. The only recognized exception to this common-law rule related to situations in which the jury verdict was affected by extraneous influences. Stated differently, where there is evidence to suggest the verdict was affected by influences external to the trial proceedings, courts may consider juror testimony to impeach a verdict. However, where the alleged misconduct relates to influences internal to the trial proceedings, courts may not invade the sanctity of the deliberative process.
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> * * *
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> [T]he distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether

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[7] *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997).

[8] *Id*.

[9] *Id*. at 88-89.

> the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence.[10]

In *Fletcher*, the jurors collectively reenacted the crime scene in the jury room using the gun that the defendant had used to commit the crime.[11] This Court found that the reenactment was not an extraneous influence because it "was closely intertwined with the deliberative process and was not premised on anything other than the jurors' collective account of the evidence presented in open court."[12] Similarly, in this case, the juror's experiment was closely intertwined with his deliberative process. The juror's experiment was an attempt to recreate the crime scene, apparently aimed at discovering how the crime was committed. Nothing indicates that the experiment was premised on anything beyond this juror's memory of the testimony. Accordingly, the experiment was not an extraneous influence and cannot be a basis for attacking the jury's verdict.

Stokes relies on *Doan v Brigano*[13] for support. In *Doan*, a juror conducted an experiment in her home to determine if the defendant's testimony was truthful.[14] The juror then shared the results of her experiment with the rest of the jury.[15] The Sixth Circuit concluded that this experiment was an improper extraneous influence on the jury because by sharing the results of

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[10] *People v Fletcher*, 260 Mich App 531, 539, 541; 679 NW2d 127 (2004) (quotation marks and citations omitted; alteration in original).

[11] *Id*. at 537.

[12] *Id*. at 542.

[13] *Doan v Brigano*, 237 F3d 722 (CA 6, 2001), abrogated on other grounds by *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

[14] *Doan*, 237 F3d at 726-727.

[15] *Id*. at 727.

her experiment, the juror brought extraneous facts before the jury.[16] The present case is distinguishable. The juror in the instant matter did not share the results of his experiment with any other jurors, and thus, no extraneous facts were brought into the jury room. Because the juror that conducted the experiment did not "testify" as an expert witness to the other jurors, the experiment did not amount to an extraneous influence.[17] Accordingly, Stokes is not entitled to relief.

B. *BRADY* VIOLATION

Stokes next argues that the prosecution violated the rule of *Brady v Maryland*[18] by failing to disclose various pieces of evidence. Stokes also argues that trial counsel was ineffective for failing to request access to Stokes's cell phone until the first day of trial. We disagree.

This Court reviews due process claims, such as allegations of a *Brady* violation, de novo.[19] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."[20] A trial court's factual findings, if any, are reviewed for clear error.[21] The ultimate question whether counsel was ineffective is a constitutional issue reviewed de novo.[22]

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[16] *Id*. at 734-736. Ultimately, the *Doan* court denied relief, concluding that the error was harmless. *Id*. at 736-739.

[17] *Fletcher*, 260 Mich App at 543.

[18] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[19] *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

[20] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[21] *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[22] *Id*.

"A defendant has a due process right of access to certain information possessed by the prosecution."[23] A *Brady* violation occurs if: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material."[24] "The government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith . . . . Evidence is favorable to the defense when it is either exculpatory or impeaching."[25] "To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[26]

Stokes argues that the prosecutor committed a *Brady* violation by failing to provide Stokes with access to his own cell phone. On the first day of trial, Stokes's counsel requested access to the cell phone in order to find contact information for the individual who prepared a flyer advertising the tattoo party. The prosecutor agreed to allow defense counsel to view the cell phone for this purpose. The following day, defense counsel acknowledged that she had obtained the contact information from another source and that the witness was being interviewed. The same witness testified at trial.

Stokes's *Brady* claim fails for a variety of reasons. First, the record does not support Stokes's assertion that the cell phone was not provided to him. When Stokes requested access to the cell phone, the prosecutor offered to make it available. The record does not

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[23] *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998), citing *Brady*, 373 US 83.

[24] *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014).

[25] *Id*. (citations omitted).

[26] *Id*. (quotation marks and citation omitted).

establish whether the cell phone was ever provided to Stokes. Stokes now asserts that the cell phone was lost by the police or the prosecutor and never provided to him. The only mention of the cell phone having been lost appears in a statement by defendant's appellate counsel during a hearing held in the trial court regarding Stokes's motion for a new trial. It appears that counsel, after reviewing the transcripts, simply assumed that the cell phone was lost when no mention of it was made after the first day of trial. We refuse to adopt this assumption, which has no apparent basis in the record. Stokes has not established that the prosecutor actually suppressed evidence.

Nor has Stokes satisfied the third prong by demonstrating that the cell phone contained material information that could have altered the outcome of the trial. To succeed on his claim, Stokes must demonstrate that the cell phone contained evidence that, had it been disclosed, would have been reasonably likely to lead to a different result.[27] Stokes first argues that the cell phone contained contact information for the individual who prepared the flyer. However, Stokes obtained this information from another source, and the witness testified at trial. Stokes also argues that the cell phone contained a tracking program that could have shown his location on the night of the carjacking. However, Stokes provides no evidence of what information this tracking program would have provided, nor does he explain why the cell phone was necessary to obtain the information. Stokes also asserts that the cell phone contained "additional alibi information," but fails to explain what alibi information would be found on the cell phone. We simply have no basis to conclude that

[27] *Id.*

the cell phone contained any information that was reasonably likely to lead to a different result in this case.

Stokes also argues that trial counsel was ineffective for failing to seek access to the cell phone until the day of trial, at which point Stokes assumes the cell phone had been lost. "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise."[28] "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different."[29] As our Supreme Court has recognized, the materiality prong of the *Brady* test requires the same showing of prejudice required to establish ineffective assistance of counsel.[30] Because Stokes cannot demonstrate that any material evidence was withheld, he cannot demonstrate that any failure by his attorney to seek this evidence earlier warrants relief.

C. SENTENCING ERROR

Next, Stokes argues that, under *Alleyne v United States*,[31] his Sixth Amendment right to a jury trial was violated when the trial court made factual findings to determine Stokes's minimum sentence. We agree. "A Sixth Amendment challenge presents a question of constitutional law that this Court reviews de novo."[32]

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[28] *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

[29] *Id*.

[30] *Chenault*, 495 Mich at 159.

[31] *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

[32] *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015).

Michigan's legislatively enacted sentencing scheme requires a trial court to score a number of variables that take into account a defendant's past criminal history and the circumstances of the crime.[33] Using the resulting scores, trial courts must then determine the appropriate range for a defendant's minimum sentence using the appropriate sentencing grid.[34] Crucially, when scoring the variables, trial courts are permitted to make factual findings which need only be supported by a preponderance of the evidence.[35] Until recently, under the guidelines as enacted by our Legislature, trial courts were required to impose a minimum sentence falling within the calculated range, unless the trial court was able to articulate a substantial and compelling reason warranting a departure from that range.[36]

In *People v Lockridge*, our Supreme Court held that Michigan's sentencing scheme violated the Sixth Amendment right to a jury trial because it required "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase[d] the floor of

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[33] See *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008). As the Court explained, "the very purpose of the sentencing guidelines is to facilitate proportionate sentences." *Id*.

[34] See MCL 777.61 to MCL 777.69; *Lockridge*, 498 Mich at 365 ("[A] sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence.").

[35] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[36] MCL 769.34(2) ("[T]he minimum sentence imposed by a court . . . shall be within the appropriate sentence range . . . ."); MCL 769.34(3) ("A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure . . . ."). See also *Lockridge*, 498 Mich at 387 ("The guidelines minimum sentence range *is* binding on trial courts, absent their articulating substantial and compelling reasons for a departure.").

the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*."[37] Precisely such a violation occurred in this case. Although the jury acquitted Stokes of both firearms charges brought against him, the trial court scored OVs 1 and 2 as if Stokes possessed a pistol and pointed it at Jones.[38] If no points are assigned to these variables, Stokes's OV level drops from Level III to Level II, and his minimum sentence range under the guidelines as a second-offense habitual offender would be reduced from a range of 126 to 262 months to a range of 108 to 225 months.[39] Thus, it cannot be disputed that the trial court relied on facts not admitted by Stokes or found by the jury in order to calculate his sentencing guidelines range, and that these judicially found facts resulted in an increased minimum sentencing range. As such, under *Lockridge*, Stokes's Sixth Amendment rights were violated at sentencing.

In *Lockridge*, our Supreme Court contemplated several possible methods to remedy this constitutional defect. One potential remedy considered by the Court was "to require juries to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict."[40] Stokes requests such a remedy here: he asks this Court to remand for resentencing, but with no points as-

[37] *Lockridge*, 498 Mich at 364. See also *id*. at 399 ("Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under *Alleyne*.").

[38] Specifically, the trial court assigned 15 points to OV 1 for pointing a firearm at Jones, MCL 777.31(1)(c), and 5 points to OV 2 for possessing a pistol, MCL 777.32(1)(d), for a total of 20 points.

[39] See MCL 777.62; MCL 777.21(3)(a).

[40] *Lockridge*, 498 Mich at 389.

signed to OVs 1 and 2, such that his minimum sentence would fall between 108 and 225 months. He asks that the trial court be required to sentence him within this reduced range, absent a substantial and compelling reason warranting a departure. However, our Supreme Court "reject[ed] this option" because requiring all facts utilized in the sentencing guidelines to either be found by a jury or admitted by the defendant "could essentially turn sentencing proceedings into mini-trials," and "[t]he constitutional violation c[ould] be effectively remedied without burdening our judicial system in this manner . . . ."[41] Thus, we cannot grant Stokes the remedy he seeks.

Rather, because the rule of *Alleyne* only applies to judicial fact-finding that *mandatorily* increases a minimum sentence,[42] our Supreme Court concluded that the appropriate remedy was to render Michigan's sentencing guidelines merely advisory.[43] The Court did so through a "judicial rewriting of the statute, . . . substitut[ing] the word 'may' for 'shall' in MCL 769.34(2) and remov[ing] the requirement in MCL 769.34(3) that a trial court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure."[44] Thus, in effect, MCL 769.34(2) now reads:

> Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum

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[41] *Id*.

[42] See *id*. at 364; *Alleyne*, 133 S Ct at 2155.

[43] *Lockridge*, 498 Mich at 399 ("To remedy the constitutional flaw in the guidelines, we hold that they are advisory only."). Our Supreme Court adopted this remedy from *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). *Lockridge*, 498 Mich at 391.

[44] *Lockridge*, 498 Mich at 391.

> sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 [may] be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.[45]

In effect, MCL 769.34(3) now reads, "A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII . . . ."[46]

Our Supreme Court was careful to state that the sentencing guidelines must still be scored, and that trial courts must assess the "highest number of points possible" to each variable, "whether using judge-found facts or not."[47] Trial courts must "continue to consult the applicable guidelines range and take it into account when imposing a sentence."[48] Thus, under *Lockridge*, while the sentencing guidelines must still be scored by the trial court, the resulting range is merely an advisory range that must be taken into account by the trial court when imposing a sentence.[49] "When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so."[50] As explained by our Supreme Court, "[b]ecause sentenc-

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[45] MCL 769.34(2); *Lockridge*, 498 Mich at 391.

[46] MCL 769.34(3); *Lockridge*, 498 Mich at 391.

[47] *Lockridge*, 498 Mich at 392, 392 n 8.

[48] *Id*. at 392.

[49] *Id*. at 391-392.

[50] *Id*. at 392.

ing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion."[51]

In *Lockridge*, our Supreme Court instructed courts regarding how to proceed "in the many cases that have been held in abeyance for this one."[52] Noting that "virtually all" of these cases involve unpreserved challenges, our Supreme Court described a procedure, the goal of which is to determine whether a *Lockridge* error resulted in prejudice to any given defendant.[53] Such an inquiry is necessary because *unpreserved* constitutional errors are subject to plain-error review, which requires a defendant to demonstrate not only that an error occurred, but "that the error affected the outcome of the lower court proceedings."[54] Our Supreme Court held that if a defendant is able to "establish a threshold showing of the potential for plain error," the case must "be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing."[55] The precise

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[51] *Id*.

[52] *Id*. at 394.

[53] *Id*. at 394-399.

[54] *Id*. at 393.

[55] *Id*. at 395, 397. The Court determined that a "threshold showing of the potential for plain error" is made in "cases in which facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," and in which the trial court did not impose a sentence that was an upward departure from the guidelines range. *Id*. at 395. That is the precise scenario now before us. Thus, had Stokes failed to preserve his claim of error, the remand procedure described in *Lockridge* would clearly be required.

procedure to be followed, modeled on that adopted in *United States v Crosby*,[56] is as follows:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by [MCR 6.425], if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence.[57]

However, in this case, Stokes preserved his claim of error by raising the issue in the trial court.[58] "[C]onstitutional error such as occurred here must be classified as either structural or nonstructural. If the error is structural, reversal is automatic. If the constitutional error is not structural, it is subject to the harmless beyond a reasonable doubt test."[59] A *Lockridge* error is not structural,[60] and thus, must be reviewed for harmless error.

We conclude that in order to determine whether the error in this case was harmless, the *Crosby* remand

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[56] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

[57] *Lockridge*, 498 Mich at 398 (quotation marks and citation omitted).

[58] See *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013). In the instant case, the trial court denied relief, relying on this Court's opinion in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), overruled by *Lockridge*, 498 Mich at 399.

[59] *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000) (citation omitted).

[60] See *Lockridge*, 498 Mich at 392 n 29.

procedure must be followed. First and foremost, the Court's opinion in *Lockridge* supports this conclusion. In *Lockridge*, our Supreme Court cited with approval the following language from *Crosby*:

> A remand for determination of *whether* to resentence is appropriate in order to undertake a proper application of the plain error *and harmless error* doctrines. Without knowing whether a sentencing judge would have imposed a materially different sentence, . . . an appellate court will normally be unable to assess the significance of any error that might have been made. . . .
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> Obviously, any of the errors in the procedure for selecting the original sentence discussed in this opinion would be *harmless*, and not prejudicial under plain error analysis, if the judge decides on remand, in full compliance with now applicable requirements, that . . . the sentence would have been essentially the same as originally imposed. Conversely, a district judge's decision that the original sentence would have differed in a nontrivial manner from that imposed will demonstrate that the error in imposing the original sentence *was harmful* and satisfies plain error analysis.[61]

Unfortunately, our analysis is not as simple as applying this language as it reads. In the same year that the Second Circuit decided *Crosby*, it also decided *United States v Lake*.[62] In *Lake*, the court held that with respect to *preserved* sentencing errors of the type now at issue, the *Crosby* procedure does not apply.[63] The Second Circuit described its own references to harmless error in *Crosby* as merely dicta, and held that an intervening case, *United States*

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[61] *Id*. at 396, quoting *Crosby*, 397 F3d at 117-118 (first emphasis in original; first and second omissions in original).

[62] *United States v Lake*, 419 F3d 111 (CA 2, 2005).

[63] *Id*. at 113 n 2.

v Fagans,[64] "abrogated the dictum in *Crosby* that had indicated that a *Crosby* remand would be appropriate for application of the harmless error doctrine as well as the plain error doctrine."[65] The court stated that "the issue upon review of the preserved error is whether we should affirm, if the Government has shown the error to be harmless, or remand for resentencing, if such a showing has not been made."[66] That the Second Circuit has repudiated *Crosby* to the extent it held that its remand procedure applied to preserved claims raises the question whether this Court should do the same.

But given that our Supreme Court specifically expressed its "agreement with" the quoted analysis stated in *Crosby*,[67] we believe our Supreme Court intended the *Crosby* procedure to apply to both preserved and unpreserved errors. Notably, our Supreme Court did not acknowledge or address *Lake* or any other cases discussing how to proceed with preserved errors of the nature at issue here. And although *Lockridge* concerned an unpreserved claim of error, the portion of the Court's opinion in which the quoted *Crosby* analysis appears is a section explicitly devoted to describing the appropriate procedure to be followed in cases, such as this one, involving pre-*Lockridge* sentencing errors. Thus, we cannot say that our Supreme Court's reference to this language was merely dictum.

As a practical matter, we see no reason why if the *Crosby* procedure is necessary to resolve unpreserved claims, it would not likewise be necessary to resolve preserved claims. Ultimately, the purpose of a *Crosby*

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[64] *United States v Fagans*, 406 F3d 138 (CA 2, 2005).

[65] *Lake*, 419 F3d at 113 n 2.

[66] *Id*.

[67] *Lockridge*, 498 Mich at 395.

remand is to determine what effect *Lockridge* would have on the defendant's sentence so that it may be determined whether any prejudice resulted from the error.[68] Similarly, we cannot say with certainty that the error was or was not harmless without knowing what sentence would result had the trial court "been aware that the guidelines were merely advisory."[69] Perhaps the largest difference between establishing prejudice under the plain error test and the harmless error test is on which party the burden lies. Under the plain error test, the burden lies with the defendant to demonstrate "that the error affected the outcome of the lower court proceedings."[70] But when a constitutional error is preserved, the burden falls on "the beneficiary of the error," in this case, the prosecution, to "establish[] that it is harmless beyond a reasonable doubt."[71] Yet whether this Court's review is for plain error or for harmless error, the overriding question is the same: what effect, if any, did the error have on the lower court proceedings? On whom the burden falls does not change the nature of the inquiry. We see no logical reason why the *Crosby* remand procedure should apply to unpreserved errors, but not to preserved errors.

Further, the *Crosby* procedure offers a measure of protection to a defendant. As the first step of this procedure, a defendant is provided with an opportunity "to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought."[72] We

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[68] See *id*. at 394-397.

[69] *Id*. at 395 n 31.

[70] *Id*. at 393.

[71] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[72] *Lockridge*, 498 Mich at 398 (quotation marks, citation, and alteration omitted). Our Supreme Court did not define what constitutes "prompt notification" by a defendant in the context of a *Crosby* remand.

believe this step is particularly important because, given the sentencing discretion now afforded to trial courts, Stokes faces the possibility of receiving a more severe sentence if he is resentenced.[73] Although Stokes raised his challenge in the trial court and has pursued the issue on appeal, his desired remedy was resentencing with a lower, but still mandatory, guidelines range. While Stokes has ultimately prevailed on his claim of constitutional error, we do not assume that he is satisfied with the remedy available to him. If we were to simply remand for resentencing, we would deprive Stokes of the opportunity to avoid resentencing if that is his desire. In that sense, we would be punishing Stokes for preserving his claim of error.[74]

Id. Certainly, the question of what constitutes timely notice may arise in a future case, particularly if a trial court were to deem a notice untimely and then proceed to resentence a defendant to a more severe sentence. However, that issue is not presently before the Court. Thus, we decline to address the question at this juncture.

[73] See *Crosby*, 397 F3d at 117 ("[A] change in cases of sentences below a statutory maximum might yield a higher sentence . . . ."); *United States v Regalado*, 518 F3d 143, 149 (CA 2, 2008) ("*Crosby* recognized that a resentencing might yield a higher sentence."). See also *Alabama v Smith*, 490 US 794, 798; 109 S Ct 2201; 104 L Ed 2d 865 (1989) (holding that a higher sentence on resentencing is permissible so long as the trial court is not motivated by vindictiveness against a defendant for having succeeded on appeal). We note that the trial court must make its initial determination whether to resentence a defendant based on the " 'circumstances existing at the time of the original sentence.' " *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 117. However, if resentencing occurs, the trial court may rely on new information to justify a more severe sentence. *People v Mazzie*, 429 Mich 29, 36-37; 413 NW2d 1 (1987). See also *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002) ("When a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a presumption of vindictiveness. That presumption may be overcome if the trial court enunciates reasons for doing so at resentencing.") (quotation marks and citation omitted).

[74] We reiterate that if Stokes had not preserved his claim, the *Crosby* procedure would clearly be applicable here. See note 55 of this opinion.

Thus, in this case, we remand the matter to the trial court to follow the *Crosby* procedure in the same manner as outlined in *Lockridge* for unpreserved errors. Stokes may elect to forgo resentencing by providing the trial court with prompt notice of his intention to do so.[75] If "notification is not received in a timely manner," the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*.[76]

D. FAILURE TO REQUEST JURY INSTRUCTIONS[77]

Stokes argues that he was denied the effective assistance of counsel because his trial counsel failed to request two jury instructions. We disagree.

Stokes first argues that his trial counsel was ineffective for failing to request that the jury be provided with M Crim JI 4.4. In relevant part, this instruction states that evidence of flight "does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt."[78] The jury is then instructed that it "must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind."[79]

Officer Theodore Jackson arrested Stokes after a traffic stop and testified that Stokes stated he was moving to Flint. Jackson also testified that he found "[s]everal bags of clothes and shoes; socks and toothbrush; everything," in the car. However, Jackson did

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[75] *Lockridge*, 498 Mich at 398.

[76] *Id*.

[77] This issue and the remaining issues were raised by Stokes in his Standard 4 Brief on Appeal.

[78] M Crim JI 4.4(2).

[79] M Crim JI 4.4(3).

not put this information in his written report. At trial, defense counsel attempted to establish that perhaps Jackson was mistaken that Stokes had planned to move to Flint, pointing out that Jackson had made several other arrests since he arrested Stokes.

To establish that counsel was ineffective, Stokes must overcome the "strong presumption that counsel's assistance constituted sound trial strategy."[80] Stokes cannot overcome this presumption. The prosecutor did not place much emphasis on Stokes's attempted flight, and defense counsel's strategy was to imply that Jackson had confused Stokes's arrest with that of another individual. Instructing the jury regarding evidence of flight would have drawn further attention to evidence that was not favorable to Stokes. Under the circumstances, Stokes cannot overcome the presumption that counsel's decision not to request the instruction was sound trial strategy.

Stokes also argues that counsel was ineffective for failing to request an alibi instruction. Given that Stokes largely relied on an alibi defense, it is unclear why counsel failed to request an alibi instruction. But even assuming the failure to request the instruction was objectively unreasonable, Stokes cannot demonstrate a reasonable probability of a different result had the instruction been provided. The trial court appropriately instructed the jury regarding the prosecutor's burden of proof and the elements of the crime. The trial court also thoroughly instructed the jury that the prosecutor had the burden of proving that Stokes was the individual who committed the crime. The trial court further instructed the jury on how to consider identification evidence. Under similar circumstances, this Court has explained:

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[80] *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).

> The failure to give an alibi instruction is not error requiring reversal where the court properly instructs on the elements of the charged offense and the prosecutor's burden of proof. Consistent with this principle, where, as here, these instructions were given, the absence of an alibi instruction would not have a reasonable probability of affecting the outcome of the trial. Therefore, we conclude defendant was not denied the effective assistance of counsel.[81]

For the same reasons, Stokes was not denied the effective assistance of counsel as a result of his counsel's failure to request an alibi instruction.

E. FAILURE TO INVESTIGATE

Stokes next argues that counsel was ineffective for failing to interview any of the prosecutor's witnesses and for failing to investigate the possible involvement of another man named Andre.[82] We disagree. A defendant raising a claim of ineffective assistance of counsel bears the burden of proving the factual predicate of his or her claim.[83] To support his assertions, Stokes relies only on affidavits attached to his pro se appellate brief. But because Stokes did not preserve this claim in the trial court, "our review is limited to errors apparent on the record."[84] As there is no available record to establish that trial counsel failed to interview or investigate these witnesses, Stokes's claim necessarily fails.

F. RIGHT TO PRESENT A DEFENSE

Stokes next argues that his constitutional right to present a defense was violated when the trial court

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[81] *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000) (citation omitted).

[82] Andre's last name is not disclosed in the record.

[83] *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[84] *Matuszak*, 263 Mich App at 48.

ruled that his trial counsel could not, in closing argument, specifically implicate another individual, Andre, as the man who committed the carjacking. We disagree. This Court reviews "de novo the question whether a defendant was denied the constitutional right to present a defense."[85] "This Court reviews the trial court's ruling with regard to closing arguments for an abuse of discretion."[86]

Antawon Wright is Stokes's younger brother and lives with Stokes. The two share a bedroom. During a search of Stokes's home, the police recovered Jones's stolen cell phone from this bedroom. Wright testified that he bought the cell phone from Andre, who also lived in the home. Based on this evidence, Stokes's attorney sought to argue that it was Andre, not Stokes, who committed the carjacking and robbery. The trial court denied the request because it "did not feel that the evidence adduced during the trial would support such an inference."

"The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of the law to the jury."[87] Thus, "[c]losing argument is not the time to introduce new evidence."[88] However, an attorney may argue the facts and all reasonable inferences arising from the evidence admitted at trial.[89] Under the circumstances, the trial court abused its discretion when it refused to allow defense counsel to specifically argue that Andre was the individual who committed the crimes. Because Jones's cell phone was taken from Jones during the carjacking,

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[85] *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

[86] *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009).

[87] *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987).

[88] *Id*.

[89] See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

and Wright had testified that Andre sold the same cell phone to him, a rational inference could be drawn that Andre was the individual who committed the carjacking. This was not an attempt to add new evidence to the trial; it was a permissible attempt to argue a reasonable inference from the evidence adduced at trial.

However, this error did not deprive Stokes of his right to present a defense. " 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.' "[90] Stokes received a meaningful opportunity to present a complete defense. The relevant evidence was presented to the jury. Stokes's trial counsel, while not allowed to specifically refer to Andre, was permitted to extensively argue that Stokes was not the individual who committed the crimes. Counsel argued that Jones had incorrectly identified Stokes, pointing to various discrepancies in Jones's testimony and facts that might have affected Jones's ability to see his assailant. Counsel also discussed the cell phone recovered from Stokes's bedroom. Counsel pointed out that Wright had testified to purchasing the cell phone from Andre and then asked the jury to consider why the police had not investigated "another male" who lived in the home. The only men who lived in the home were Stokes, Wright, and Andre. Thus, given the preceding arguments made by counsel, counsel's reference to "another male" living in the home clearly implied the

[90] *Unger*, 278 Mich App at 249, quoting *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (quotation marks and citations omitted).

possibility that Andre committed the crimes. Stokes was not deprived of a meaningful opportunity to present a complete defense.[91]

G. PRELIMINARY EXAMINATION

Stokes next argues that counsel was ineffective for failing to contest the circuit court's jurisdiction over Stokes. We disagree.

"Due process requires that the trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature."[92] At Stokes's preliminary examination, Jones testified that the crime occurred in Detroit. No evidence was admitted specifically demonstrating that Detroit is situated in Wayne County. Stokes argues that because it was not established that Detroit is located within Wayne County, it was not established that the Wayne Circuit Court was the proper court to conduct his criminal trial. The district and circuit courts could take judicial notice of the fact that Detroit is situated within the borders of Wayne County.[93] Counsel was not ineffective for failing to

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[91] For the same reasons, while the trial court abused its discretion by failing to allow Stokes to point to Andre specifically, this error was harmless, and does not warrant reversal. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (holding that claims of preserved, nonconstitutional error do not warrant reversal unless "it is more probable than not that a different outcome would have resulted without the error").

[92] *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004) (quotation marks and citation omitted).

[93] See MRE 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); MRE 201(e) ("Judicial notice may be taken at any stage of the proceeding."). See also *People v Burt*, 89 Mich App 293,

raise such a trivial point in the trial court.[94]

H. CUMULATIVE ERROR

Finally, Stokes argues that "[a]ll of the errors that riddled" his trial deprived him of the right to a fair trial. We disagree. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not."[95] But with the exception of the sentencing error previously discussed, Stokes has failed to demonstrate the existence of any errors that resulted in prejudice. Thus, while Stokes is entitled to relief with regard to his claim of sentencing error, no further relief is warranted.

III. CONCLUSION

We affirm Stokes's convictions, but we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.[96]

WILDER and FORT HOOD, JJ., concurred with TALBOT, C.J.

297-298; 279 NW2d 299 (1979) (taking judicial notice of the fact that "no football game between Washington and Dallas, or between any other professional football teams, was televised on . . . December 24, 1976").

[94] See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

[95] *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

[96] As noted by our Supreme Court in *Lockridge*, two federal circuit courts have adopted a remand procedure similar to the *Crosby* procedure, "although modifying it so that the appellate court retains jurisdiction throughout the limited remand, and thus it is the *appellate court* that will vacate the sentence upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory." *Lockridge*, 498 Mich at 396 n 33 (quotation marks and citations omitted). That our Supreme Court acknowledged such a procedure, but did not adopt it, is informative. When an appellate court orders a *Crosby* remand, it should not retain jurisdiction. See *id*.

SALEM SPRINGS, LLC v SALEM TOWNSHIP

Docket No. 322956. Submitted September 1, 2015, at Lansing. Decided September 8, 2015, at 9:05 a.m. Leave to appeal sought.

Salem Springs, LLC, brought an action in the Washtenaw Circuit Court against Salem Township and the Washtenaw County Clerk, seeking to enjoin an election that was to be held in November 2012 concerning the rezoning of property formerly owned by plaintiff. Plaintiff had owned the property until 2009, when it transferred the property to Salem Springs Owner, LLC, a separate and distinct company, although plaintiff served as the manager of Salem Springs Owner. The property had been zoned as agricultural-residential property. In 2011, plaintiff sought to have the property rezoned as general-commercial property. The Salem Township Board of Trustees approved the change. Intervening defendant Norman Klein, Sr., filed a notice of intent under MCL 125.3402(1) to petition to have the amendments submitted to the electorate for approval. Klein later submitted a petition signed by the requisite number of voters, and the township board approved ballot language submitting the issue to the voters. Plaintiff filed this action to enjoin the vote, alleging the petition was invalid. Klein and others moved to intervene. The court, Donald E. Shelton, J., granted the motion to intervene and denied plaintiff's request for injunctive relief. The Court of Appeals and the Michigan Supreme Court denied plaintiff's applications for leave to appeal. 493 Mich 880 (2012). The vote was held, and the electorate voted to reverse the board's decision to change the zoning. Plaintiff then filed an amended complaint that included a quo warranto claim challenging the election results under MCL 600.4545. Intervening defendants moved for summary disposition, asserting that plaintiff lacked standing under the statute. Plaintiff opposed intervening defendants' motion for summary disposition, asserting that summary disposition should instead be granted in plaintiff's favor because no material question of fact remained with respect to whether Klein's petition was invalid. The court concluded that plaintiff had standing and it granted summary disposition in favor of plaintiff. Intervening defendants appealed.

The Court of Appeals *held*:

Under MCL 600.4545(1), a lawsuit in the nature of a quo warranto action may be brought whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof. The purpose of such an action is to test the validity of the election itself, and to succeed requires a showing of fraud or error that might have affected the outcome of the election. The action must be brought within 30 days after the election by the attorney general, the prosecuting attorney of the proper county, or by any citizen of the county. Only those individuals specifically identified in the statute have authority to bring an action under the statute. Consequently, in this case, plaintiff must have been a citizen of Washtenaw County to have had standing to bring suit under the statute.

To be a citizen of the county, at minimum, plaintiff would need to have inhabited or resided in the county at the time of filing suit. Plaintiff did not inhabit Washtenaw County as required to be considered a citizen of the county, given that its original registered office was located in Oakland County, other documents listed plaintiff's address as in Wayne County, and there was no evidence that plaintiff owned property or had a place of business in Washtenaw County. Neither plaintiff's former ownership of the property in Washtenaw County nor its management of Salem Springs Owner conferred the requisite Washtenaw County citizenship on plaintiff. Plaintiff and Salem Springs Owner were organized as separate and distinct limited liability companies under the Michigan Limited Liability Company Act, MCL 450.4101 *et seq*. Plaintiff, accordingly, had no interest in the Washtenaw County property after it transferred ownership to Salem Springs Owner, and even supposing that mere ownership of land in a county confers citizenship for purposes of MCL 600.4545, plaintiff could not claim citizenship in Washtenaw County based on its previous ownership of land there.

To the extent plaintiff suggested that its management of Salem Springs Owner conferred standing on plaintiff under MCL 600.4545, this argument ignored the distinction between acting as an agent on behalf of Salem Springs Owner and plaintiff's attempt to litigate in plaintiff's own name. While plaintiff could have, acting as the manager, filed suit in the name of Salem Springs Owner, it did not follow that plaintiff could file suit in its own name based on Salem Springs Owner's purported standing

under MCL 600.4545. Further, even accepting for the sake of argument that Salem Springs Owner had standing under MCL 600.4545, plaintiff could not amend its pleadings to add Salem Springs Owner as a party because the time limit for bringing the action had expired and the relation-back doctrine, MCR 2.118(D), does not apply to the addition of new parties. The trial court erred by granting summary disposition in favor of plaintiff. Because plaintiff lacked standing to bring suit under MCL 600.4545, the trial court should have granted summary disposition in favor of intervening defendants.

Reversed and remanded for entry of an order granting summary disposition in favor of intervening defendants.

QUO WARRANTO — ELECTIONS — WHO MAY FILE SUIT.

Under MCL 600.4545(1), a lawsuit in the nature of a quo warranto action may be brought whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof; the action must be brought by the attorney general, the prosecuting attorney of the proper county, or by any citizen of the county; only those individuals specifically identified in the statute have authority to bring an action under the statute; to be a citizen of the county, at minimum, the plaintiff would need to have inhabited or resided in the county at the time of filing suit.

Carson Fischer, PLC (by *Robert M. Carson* and *Jeffrey B. Miller*), for plaintiff.

Before: BORRELLO, P.J., and HOEKSTRA and O'CONNELL, JJ.

HOEKSTRA, J. In this case, brought in the nature of a quo warranto action under MCL 600.4545, plaintiff, Salem Springs, LLC, challenged the results of a voter referendum pertaining to a zoning amendment in Salem Township. Intervening defendants appeal as of right the trial court's order granting summary disposition in favor of plaintiff and invalidating the referendum results. Because plaintiff lacks statutory standing to bring a challenge under MCL 600.4545, we reverse

the trial court's order and we remand for entry of summary disposition in favor of intervening defendants.

The underlying dispute in this case concerns the zoning of 91.61 acres of property (the property) in Salem Township, Washtenaw County, Michigan. Plaintiff previously owned the property, but it transferred the property to Salem Springs Owner, LLC, in 2009. Plaintiff is now the sole manager of Salem Springs Owner, but Salem Springs Owner is a limited liability company, separate and distinct from plaintiff.

In October 2011, the property in question was zoned agricultural-residential property, and plaintiff submitted an application to the township to have the property rezoned to general-commercial property. The Salem Township Planning Commission recommended denial of plaintiff's application, but it was nonetheless approved by the Salem Township Board of Trustees on May 8, 2012. After approval of the amendments to the zoning map, pursuant to MCL 125.3401(7), the township published notice on four separate occasions—on May 20, May 24, May 31, and June 14—apprising the public of the intended changes. On May 22, intervening defendant Norman Klein, Sr., who lives in a residential area north of the subject property, filed a notice of intent under MCL 125.3402(1) to petition to have the amendments submitted to the electorate for approval. On July 12, Klein later submitted a petition signed by the requisite number of voters, and the township clerk concluded that Klein's petition was adequate. See MCL 125.3402(2) and (3). The township board thereafter approved ballot language submitting the issue of the zoning amendments to the voters for approval.

Plaintiff filed suit seeking to enjoin the vote based on the contention that Klein's petition was invalid. The

trial court denied plaintiff's request for injunctive relief and this Court, as well as the Michigan Supreme Court, denied plaintiff's emergency application for leave to appeal.[1] After plaintiff's application for leave was denied, the election proceeded on November 6, 2012, with the zoning referendum on the ballot. A majority of voters were opposed to rezoning the property in question to general-commercial property and they voted to reverse the township board's zoning decision. In effect, the property remained zoned as agricultural-residential property.

Following the election, on November 20, 2012, plaintiff filed an amended complaint, which included a quo warranto claim challenging the election results under MCL 600.4545. Intervening defendants moved for summary disposition based on the assertion that plaintiff lacked statutory standing to bring an action under MCL 600.4545. Plaintiff opposed intervening defendants' motion for summary disposition and asserted that summary disposition should instead be granted in plaintiff's favor because no material question of fact remained with respect to whether Klein's petition was untimely and thus invalid. The trial court concluded that plaintiff had standing and it granted plaintiff's motion for summary disposition based on its determination that Klein's July 12 petition was untimely, despite the fact that it was filed within 30 days of the township's last published notice. Intervening defendants now appeal as of right.

On appeal, consistently with their arguments in the trial court, intervening defendants maintain that plaintiff lacked statutory standing under MCL 600.4545

[1] See *Salem Springs, LLC v Salem Twp*, 493 Mich 880 (2012); *Salem Springs, LLC v Salem Twp*, unpublished order of the Court of Appeals, entered October 8, 2012 (Docket No. 312497).

because plaintiff is not the county prosecuting attorney, the attorney general, or a citizen of Washtenaw County. In contrast, plaintiff maintains that it is a "citizen of the county" within the meaning of MCL 600.4545 because a corporation may, in general, be a citizen and more particularly because it previously owned the land in question and now continues to manage Salem Springs Owner, the present owner of the land.[2] In the alternative, plaintiff contends that, even if it lacks standing, any error amounts to merely a technical defect in the pleadings because Salem Springs Owner has standing and the pleadings can be amended to include Salem Springs Owner. As discussed more fully later in this opinion, we conclude that plaintiff lacked statutory standing under MCL 600.4545, that plaintiff cannot rely on Salem Springs Owner's purported standing to file suit, and that, because the time for filing an action under MCL 600.4545 has passed, plaintiff cannot amend its pleadings to add Salem Springs Owner as a new party. Because plaintiff lacks standing, the trial court erred by denying intervening defendants' motion for summary disposition.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*,

[2] Plaintiff also maintains that intervening defendants waived their standing argument because they stipulated to an order allowing plaintiff to file the amended complaint which included the claim brought under MCL 600.4545. We find this argument unavailing. Far from waiving the issue of standing, intervening defendants plainly preserved it by raising the question of standing in their first responsive pleading to plaintiff's amended complaint. See MCR 2.116(D)(2). Further, standing may be challenged in connection with a motion for summary disposition under MCR 2.116(C)(8) or (10), and such a motion may be brought "at any time[.]" *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v City of Pontiac No 2*, 309 Mich App 611, 621; 873 NW2d 783 (2015) (quotation marks and citation omitted; alteration in original). In short, intervening defendants' challenge to plaintiff's standing was timely raised and certainly not waived.

461 Mich 109, 118; 597 NW2d 817 (1999); *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v City of Pontiac No 2*, 309 Mich App 611, 617-618; 873 NW2d 783 (2015). Ordinarily, questions of law, including statutory interpretation and the issue of a party's standing, are also reviewed de novo. *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 360; 615 NW2d 255 (2000).

Before a court may exercise jurisdiction over a plaintiff's claim, that plaintiff must possess standing. *Miller v Allstate Ins Co*, 481 Mich 601, 606; 751 NW2d 463 (2008). "[S]tanding historically developed in Michigan as a limited, prudential doctrine that was intended to 'ensure sincere and vigorous advocacy' by litigants." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 359; 792 NW2d 686 (2010). A litigant may have standing "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*. at 372. When a cause of action is governed by statute, the Legislature may, of course, choose to limit the class of persons who may raise a statutory challenge. *Miller*, 481 Mich at 607. Consequently, the doctrine of statutory standing in particular requires statutory interpretation to determine whether the Legislature intended to "accord[] *this* injured plaintiff the right to sue the defendant to redress his injury." *Id*. (quotation marks and citation omitted).

The claim at issue in the present case is in the nature of a quo warranto action under MCL 600.4545. Under MCL 600.4545(1), a lawsuit in the nature of a quo warranto action may be brought "whenever it appears that material fraud or error has been commit-

ted at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof." The purpose of such an action is to test the "validity of the election itself," and to succeed requires a showing of "fraud or error that might have affected the outcome of the election." *Barrow v Detroit Mayor*, 290 Mich App 530, 542-543; 802 NW2d 658 (2010) (citation and quotation marks omitted). The specific statutory requirements for bringing an action under MCL 600.4545 are set forth in Subsection (2), which states:

> Such action shall be brought within 30 days after such election *by the attorney general or the prosecuting attorney of the proper county on his own relation, or on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof.* Such action shall be brought against the municipality wherein such fraud or error is alleged to have been committed. [MCL 600.4545(2) (emphasis added).]

According to the plain language of the statute, an action to challenge an election under MCL 600.4545 may be brought by (1) the attorney general, (2) the prosecuting attorney of the proper county, or (3) "any citizen of the county." A person authorized to bring an action under this section may do so "without any showing of a special personal interest in the subject matter at hand." *Penn Sch Dist No 7 v Lewis Cass Intermediate Sch Dist Bd of Ed*, 14 Mich App 109, 117-118; 165 NW2d 464 (1968). However, because MCL 600.4545 expressly empowers select persons to file suit, it follows under the principle of *expressio unius est exclusio alterius* that only those individuals specifically identified in the statute have authority to bring an action under the statute. See *Miller*, 481 Mich at

611-612. In other words, the statute prevents persons not identified in the statute from bringing a challenge to election results. Cf. *id*. In this case, it is undisputed that plaintiff is neither a prosecuting attorney nor the attorney general. Consequently, to file suit under MCL 600.4545, plaintiff must qualify as a "citizen of the county," and the issue in this case thus becomes whether plaintiff is a citizen of Washtenaw County.

There is no statutory definition of the phrase "citizen of the county" in MCL 600.4545. Because the phrase is undefined, we accord the words of the statute their plain and ordinary meaning and may consult a dictionary to ascertain that plain meaning. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). Our primary goal when interpreting statutory language is to ascertain the Legislature's intent, and, because the plain language of the statute is the best indicator of legislative intent, we will enforce clear and unambiguous statutory language as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012); *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528; 734 NW2d 533 (2007).

According to its plain and ordinary dictionary meaning, a "citizen" is "**1 :** an inhabitant of a city or town; [especially] : one entitled to the rights and privileges of a freeman **2 a :** a member of a state **b :** a native or naturalized person who owes allegiance to a government and is entitled to protection from it[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Black's Law Dictionary* (10th ed) ("Someone who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its

privileges."). A "county" is, by definition, "the largest territorial division for local government within a state of the U.S." *Merriam-Webster's Collegiate Dictionary* (11th ed).

From these basic definitions, to be a "citizen of the county" it would appear that, at a minimum, the plaintiff would need to inhabit or reside in the specific county in question. See *Bacon v Bd of State Tax Comm'rs*, 126 Mich 22, 29; 85 NW 307 (1901). That is, the statute clearly refers to "any citizen of *the county*,"[3] meaning that, assuming a corporation may be a citizen for purposes of MCL 600.4545, it would not be sufficient to establish citizenship in the United States or even in Michigan; rather, it would be necessary to establish citizenship, and thus some degree of residency, in the specific county at issue. By way of analogy, "[t]he citizens of this State are citizens of the United States, and the citizens of the United States residing within the borders of this State are citizens of this State." *People v Ruthenberg*, 229 Mich 315, 355; 201 NW 358 (1924) (quotation marks and citation omitted). By extension, it would follow that citizens of the United States, and specifically citizens of Michigan, residing in a particular county in Michigan qualify as citizens of that county.

On the facts of this case, it is clear that plaintiff did not in any way inhabit Washtenaw County as required to be considered a citizen of the county. Plaintiff's Articles of Organization indicate that, at the time of its organization, its registered office was in Farmington Hills, Michigan, which is in Oakland County. Other documents, including the warranty deed conveying the subject property to Salem Springs Owner, list plaintiff's address in Livonia, Michigan, which is in Wayne

[3] Emphasis added.

County. Further, there is no indication that plaintiff owns property in Washtenaw County or that plaintiff has a place of business in Washtenaw County. In short, under any understanding of what it means to reside in or inhabit as required to establish citizenship, plaintiff does not reside in, or inhabit, Washtenaw County.[4]

In contrast to this conclusion, plaintiff claims that it can be considered a citizen of the county because (1) it previously owned the property in question until 2009 and (2) it manages Salem Springs Owner, which now owns the property at issue. These arguments are wholly unavailing. Even supposing for the sake of argument that Salem Springs Owner's mere ownership of the property establishes citizenship for Salem Springs Owner in Washtenaw County, neither plaintiff's former ownership of the property nor its management of Salem Springs Owner confers this citizenship on plaintiff.

Specifically, both plaintiff and Salem Springs Owner are organized as separate and distinct limited liability companies under the Michigan Limited Liability Company Act, MCL 450.4101 *et seq*. A limited liability company may, like a corporation, own and hold real

[4] Given plaintiff's almost nonexistent ties with Washtenaw County, it is obvious plaintiff is not a citizen of the county, and, on these facts, we do not find it necessary to define the precise residency parameters necessary to establish what it means to be a citizen of a county for purposes of MCL 600.4545. Intervening defendants have also argued on appeal that plaintiff cannot be a citizen because as a corporation it cannot vote. Because of plaintiff's clear lack of residency, we likewise find it unnecessary to determine if a corporation may be a citizen under MCL 600.4545 or to establish what rights and privileges, if any, a person must possess to qualify as a citizen for purposes of this provision. Instead, we narrowly hold, on the basis of the facts of this case, that because plaintiff in no way resides in Washtenaw County, it is not a "citizen of the county" as required for statutory standing under MCL 600.4545.

property. MCL 450.4210; MCL 450.1261(f). "A member [of a limited liability company] has no interest in specific limited liability company property." MCL 450.4504(2). Consequently, when plaintiff executed a warranty deed transferring the property to Salem Springs Owner, "the entire bundle of rights to the property" passed from plaintiff to Salem Springs Owner. *Eastbrook Homes, Inc v Treasury Dep't*, 296 Mich App 336, 348; 820 NW2d 242 (2012). After this 2009 transfer, plaintiff no longer had an interest in the property, which is instead held solely by Salem Springs Owner as a limited liability company. See *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 630; 752 NW2d 479 (2008). Accordingly, even supposing that mere ownership of land in a county confers citizenship for purposes of MCL 600.4545, plaintiff cannot claim citizenship in Washtenaw County on the basis of its previous ownership of land now held by Salem Springs Owner.

To the extent plaintiff suggests that its management of Salem Springs Owner somehow confers standing on plaintiff under MCL 600.4545, this argument ignores the distinction between acting as an agent on behalf of Salem Springs Owner and plaintiff's current attempt to litigate in plaintiff's own name. In particular, a limited liability company may be managed by managers as specified in the articles of organization. MCL 450.4402(1). A manager is considered an agent of the limited liability company for the purpose of its business, and the acts of a manager in the limited liability company's name typically bind the limited liability company. MCL 450.4406. Salem Springs Owner's operating agreement specifies that it will be managed by a manager, "who, acting alone and without the approval of any Member will have the free, exclusive and absolute right, power and authority to manage and control the Company and its property and assets . . . ."

As enumerated in the operating agreement, the manager's powers include the authority to sue and to defend litigation on Salem Springs Owner's behalf. See also MCL 450.4210; MCL 450.1261(b). Certainly, considering the authority possessed by the manager, plaintiff could, acting as the manager, file suit in Salem Springs Owner's name, assuming that Salem Springs Owner possessed standing under MCL 600.4545 as a "citizen of the county."

However, it does not follow that plaintiff can file suit in its own name based on Salem Springs Owner's rights and purported standing under MCL 600.4545. It is well-established that "[a] corporation is its own 'person' under Michigan law, an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation." *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 20; 812 NW2d 793 (2011). Further, when multiple related corporations are involved, the law presumes that these corporations constitute separate legal entities. *Id*. at 20-21. With regard to principles of standing and "the real party in interest," because the law treats a corporation as an entirely separate entity, when a suit is brought to enforce corporate rights or to redress or prevent injury to a corporation, the action ordinarily must be brought in the name of the corporation, not that of a stockholder, officer, or employee.[5] *Belle Isle*

[5] A member of a limited liability company may commence and maintain a lawsuit based on the rights of the limited liability company, provided that certain statutory conditions are met. See MCL 450.4510. Among these statutory conditions, a member may not sue on the rights of the limited liability company unless the member has made a written demand for action by the limited liability company and the company has failed to comply. See MCL 450.4510(b) and (c). In this case, plaintiff does not argue that it has taken action as a member of Salem Springs Owner, and, in any event, it is plain that the conditions of MCL 450.4510 have not been satisfied given that plaintiff was fully authorized as the

Grill Corp v Detroit, 256 Mich App 463, 474; 666 NW2d 271 (2003). Although a limited liability company is not a corporation under Michigan law, *Alliance Obstetrics & Gynecology, PLC v Treasury Dep't*, 285 Mich App 284, 288; 776 NW2d 160 (2009), it is nonetheless true that the rules regarding corporate form apply equally to limited liability companies, *Hills & Dales*, 295 Mich App at 21. See also *Florence Cement Co v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011). Therefore, given that Salem Springs Owner is a separate and distinct legal entity from plaintiff, it follows that, in a suit in which standing is premised on Salem Springs Owner's purported status as a "citizen of the county" under MCL 600.4545, the suit must be brought in Salem Springs Owner's name rather than the name of Salem Springs Owner's manager, i.e., plaintiff. See *Belle Isle Grill*, 256 Mich App at 474. Accordingly, plaintiff cannot rely on its management of Salem Springs Owner to establish standing to sue in plaintiff's name under MCL 600.4545. Because plaintiff is not a citizen of Washtenaw County, plaintiff lacked standing and the trial court erred by denying intervening defendants' motion for summary disposition.

On appeal, plaintiff contends that, even if it lacked standing to bring suit under MCL 600.4545, because Salem Springs Owner has standing, plaintiff should be allowed to amend its complaint to name Salem Springs Owner as a plaintiff because the failure to include Salem Springs Owner amounts to nothing more than a technical defect in the pleadings that in no way prejudiced intervening defendants. Contrary to these assertions, accepting for the sake of argument that Salem Springs Owner has standing under MCL 600.4545,

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manager of Salem Springs Owner to take legal action in Salem Springs Owner's name, but failed to do so. See MCL 450.4510(a).

plaintiff cannot amend its pleadings to add Salem Springs Owner as a party because the time limit for bringing such an action has expired[6] and the relation-back doctrine, which normally permits amendments to relate back to the original time of filing, does not apply to the addition of new parties. See *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007). Specifically, under MCR 2.118(D):

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

In contrast to an amendment to add claims or defenses, in this case plaintiff seeks to add an entirely new party to the action, and the relation-back rule set forth in MCR 2.118(D) does not apply to the addition of new parties. See *Miller*, 477 Mich at 106-108.

Moreover, bearing in mind that Salem Springs Owner is a separate and distinct entity from plaintiff, plaintiff's proposed amendment cannot be characterized as an inadvertent misnomer or an unimportant mistake in the name of a party. Rather, plaintiff seeks the addition of an entirely new party after the expiration of the time limit for bringing suit, and the misnomer doctrine is inapplicable to the substitution or addition of new or different parties. *Id*. at 106-107.

> " 'As a general rule, . . . a misnomer of a plaintiff or defendant is amendable unless the amendment is such as

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[6] Pursuant to MCL 600.4545(2), an action to challenge an election "shall be brought within 30 days after such election . . . ." See also *Barrow*, 290 Mich App at 542. Consequently, in this case, "any citizen of the county" had until December 6, 2012 to bring a challenge to the voting results under MCL 600.4545.

> to effect an entire change of parties.' " *Parke, Davis & Co v Grand Trunk Ry System*, 207 Mich 388, 391; 174 NW 145 (1919) (citation omitted). The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, " '[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name . . . .' " *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960), quoting *Daly v Blair*, 183 Mich 351, 353; 150 NW 134 (1914); see also *Detroit Independent Sprinkler Co v Plywood Products Corp*, 311 Mich 226, 232; 18 NW2d 387 (1945) (allowing an amendment to correct the designation of the named plaintiff from "corporation" to "partnership")[,] and *Stever v Brown*, 119 Mich 196; 77 NW 704 (1899) (holding that an amendment to substitute the plaintiffs' full names where their first and middle names had been reduced to initials in the original complaint would have been permissible). Where, as here, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable. [*Id*. (quotation marks and citation omitted; alterations in original).]

In short, because the time for bringing a challenge under MCL 600.4545 has expired, and the relation-back doctrine does not apply, plaintiff cannot now amend its complaint to add Salem Springs Owner as a new party. See *Miller*, 477 Mich at 106-108.

Plaintiff is not a citizen of Washtenaw County and therefore plaintiff lacked statutory standing to challenge the election results under MCL 600.4545. Further, because the time for pursuing a challenge under MCL 600.4545 has passed, Salem Springs Owner cannot now be added, or substituted, as a party to the lawsuit. Given plaintiff's lack of standing to bring a challenge under MCL 600.4545, the trial court erred by denying intervening defendants' motion for summary

disposition.[7] See *In re Rottenberg Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013).

Reversed and remanded for entry of summary disposition in favor of intervening defendants. We do not retain jurisdiction. Having prevailed in full, intervening defendants may tax costs under MCR 7.219.

BORRELLO, P.J., and O'CONNELL, J., concurred with HOEKSTRA, J.

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[7] Because intervening defendants were entitled to summary disposition based on plaintiff's lack of standing, we offer no opinion on the timeliness of Klein's July 12 petition.

In re CONSERVATORSHIP OF BITTNER

Docket No. 320688. Submitted August 4, 2015, at Detroit. Decided September 8, 2015, at 9:10 a.m.

Suzanne Bittner-Korbus petitioned the Macomb County Probate Court to appoint a conservator for her mother, Shirley Bittner. The petition alleged that Shirley was unable to manage her property and business affairs effectively because of mental deficiency. Shirley objected and denied the allegations in the petition. After reviewing reports prepared by an appointed guardian ad litem and an independent medical examiner, the court, Carl J. Marlinga, J., ordered a conservatorship and appointed Stacey Bittner, one of Shirley's other daughters, as the conservator. Stacey appealed the conservatorship order on Shirley's behalf.

The Court of Appeals *held*:

Under MCL 700.5401(1), a probate court may appoint a conservator or make another protective order if the court determines that (a) the individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance, and (b) the individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. Under MCL 700.5407(1), the court must exercise this authority in a manner that encourages the development of maximum self-reliance and independence in a protected individual and must make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure. Accordingly, when considering a petition for conservatorship, a probate court should approach the task from a perspective of respect for the individual's right to acquire, enjoy, and dispose of his or her property as the individual sees fit. Any restrictions on this fundamental right must be narrowly tailored to the individual's specific capabilities and incapacities. Under MCL 700.5408, without appointing a conservator, the

court may authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs. MCL 700.5419(1) allows for the creation of a limited conservatorship specifying that only a part of the protected individual's property vests in the conservator. Read together, MCL 700.5407(1), MCL 700.5419(1), and MCL 700.5408 mandate that a court carefully and thoughtfully consider whether arrangements less intrusive than a conservatorship will adequately protect an individual's property as well as his or her autonomy. In this case, there was evidence that Shirley's cognitive impairments gave rise to problems in consistently being able to initiate and carry out the tasks necessary to effectively manage her financial affairs. But this finding, standing alone, did not clearly and convincingly evidence the need for conservatorship. Difficulties with math and memory plague many elderly (and not so elderly) individuals. These irksome attendants to the aging process are not necessarily disabling. Poor subtraction skills and relatively low cognitive-ability testing scores hardly render a person mentally ill or mentally deficient, or even incapable of making rational decisions regarding one's bounty. Clear and convincing evidence that a person is unable to manage property and business affairs effectively requires more than low marks on arithmetic or memory tests, or inconsistent ineptitude in balancing a checkbook. The fact that Shirley recognized her intellectual shortcomings and sought out Stacey's assistance demonstrates effective management skill rather than disability. The evidence substantiated that Shirley paid her bills on time, lived within her means, satisfactorily managed her household, and maintained an adequate ability to make responsible decisions. Accordingly, the probate court erred by finding that clear and convincing evidence satisfied MCL 700.5401(3)(a). The evidence also failed to support a conclusion that MCL 700.5401(3)(b) had been satisfied, given the dearth of evidence that Shirley's property would be wasted or dissipated unless proper management was provided. The probate court also overlooked consideration of the statutory directive that protective orders encourage maximum self-reliance and independence by restricting an individual's rights only to the extent necessary to safeguard an individual's estate. The evidence demonstrated that Shirley had proactively entered into a voluntary arrangement that adequately protected her assets and allowed her a meaningful measure of autonomy.

Reversed and remanded.

STATUTES — ESTATES AND PROTECTED INDIVIDUALS CODE — CONSERVATORSHIPS — APPOINTMENT OF A CONSERVATOR — LIMITATIONS.

Under MCL 700.5407(1), a court must exercise its authority under Part 4 of Article V of the Estates and Protected Individuals Code, MCL 700.5401 *et seq*., in a manner that encourages the development of maximum self-reliance and independence in a protected individual and must make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure; when considering a petition for conservatorship, a court should approach the task from a perspective of respect for the individual's right to acquire, enjoy, and dispose of his or her property as the individual sees fit; any restrictions on this fundamental right must be narrowly tailored to the individual's specific capabilities and incapacities; the court must consider whether arrangements less intrusive than a conservatorship will adequately protect an individual's property as well as his or her autonomy.

Cashen & Strehl, PC (by *William K. Cashen*), for Suzanne Bittner-Korbus.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for Stacey Bittner.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and STEPHENS, JJ.

GLEICHER, J. Over Shirley Bittner's strenuous objection, the probate court appointed her daughter, Stacey Bittner, as conservator of Shirley Bittner's estate. Stacey Bittner also opposed the appointment. And so did the guardian ad litem appointed by the probate court, as well as the court-appointed psychologist who evaluated Shirley Bittner. The probate court nevertheless determined that Shirley Bittner's memory problems, arithmetic inadequacies, and mild cognitive deficits rendered her unable to manage her property and business affairs.

The probate court made no finding that Shirley Bittner's property would be wasted or dissipated ab-

sent appointment of a conservator and overlooked consideration of the statutory directive that protective orders encourage "maximum self-reliance and independence" by restricting an individual's rights only to the extent necessary to safeguard an individual's estate. MCL 700.5407(1). The evidence demonstrates that Shirley Bittner had proactively entered into a voluntary arrangement that adequately protected her assets and allowed her a meaningful measure of autonomy. We reverse.

I

Shirley Bittner is 74 years old. For convenience and clarity, in the balance of this opinion we will use her first name. We refer to her three daughters, Suzanne Bittner-Korbus, Shirleen Vencleave, and Stacey Bittner, as Suzanne, Shirleen, and Stacey.

Shirley's husband of more than fifty years passed away in October 2011. Stanley Bittner had single-handedly managed the couple's financial affairs. Newly widowed, Shirley developed serious health problems that required surgery, medications, and a temporary stay in a nursing home. She emerged from this ordeal with some confusion. Shirley decided to entrust the management of her finances to Suzanne, and granted Suzanne a durable power of attorney. Shirley revised her living trust to designate Suzanne as a co-trustee with authority to act independently.

In June 2013, Shirley petitioned the probate court for an accounting and a protective order. The petition averred that Suzanne had diverted a considerable amount of Shirley's money to herself, converted many of Shirley's accounts to joint tenancies, and withdrew funds without Shirley's authorization. Shirley revoked Suzanne's power of attorney and co-trustee status, the

petition asserted, but Suzanne failed to return all the money she misappropriated and refused to "undo the joint tenancy creations . . . ." Shirley demanded an accounting, restoration of her assets, and imposition of a surcharge. In September 2013, the probate court entered a temporary restraining order and authorized discovery.

Two months later, Suzanne filed a petition seeking appointment of a conservator for Shirley. The petition alleged that Shirley was unable to manage her property and business affairs effectively because of mental illness and mental deficiency. In support of this allegation, Suzanne claimed that "Shirley believes that all her money is gone, she is spending time with her daughter Shirleen and her grandson who have previously stolen from her, [and] she does not remember things she did." Suzanne requested that a public administrator act as conservator of Shirley's estate.

Shirley responded to the petition by denying that she needed a conservator and insisting that the petition was "simply a last minute frivolous effort to distract from Petitioner Suzanne Bittner-Korbus' illegal behavior[.]" (Emphasis omitted.) Further, Shirley's answer maintained, the petition lacked any "allegations that Shirley is not managing her assets appropriately or that her management is adversely affected by some 'mental illness.' "

The probate court ordered that Shirley undergo an independent medical examination with psychologist Terry Rudolph, Ph.D., and appointed attorney Helene Phillips as Shirley's guardian ad litem. Attorney Phillips met with Shirley on January 30, 2014. According to Phillips's report, Shirley expressed a correct understanding of a conservatorship and its attendant responsibilities, denied that she lacked the "mental ca-

pacity to handle her estate," and explained in detail the basis for her belief that Suzanne had helped herself to some of Shirley's assets. The report continued:

> I went over the financial documents form with her and on the most part she was able to provide me with the majority of her financial information. Her daughter Stac[e]y corrected a few accounts and added a few accounts. She informed me that she was paying all her own bills and that at times her daughter Stac[e]y was helping her.

Subsequently, Phillips interviewed Stacey. Phillips concluded:

> After my meeting with Shirley Bittner, conversation with daughter Stac[e]y and conversations with both Suzanne's attorney and Shirley's attorney I do not believe that Shirley Bittner falls under the code's requirements of being a person who needs protection and is not in need of a conservator. I would recommend that the court not approve this conservatorship. I have some minor concerns with Shirley Bittner's full knowledge of her assets but I believe that there are enough safeguards in place with the [power of attorney given to Stacey] and daughter Stac-[e]y's help.

Dr. Rudolph interviewed Shirley in February 2014 and administered several psychological tests. He noted that Shirley had originally scheduled the exam for January 31 but forgot about it and "only came to know of it during a conversation with her attorney." Dr. Rudolph summarized his encounter with Shirley as follows:

> Today, Ms[.] Bittner was oriented to person. She was able to name her presumptive heirs. Ms[.] Bittner appeared to be able to identify her sources and amounts of monthly income, albeit that she was reading from prepared notes. She appeared to be aware of her real estate holdings.

> Ms[.] Bittner was alert, verbal and oriented fully to person and place and generally to time. Her memory was in the low average to borderline range but her fund of general information was intact. She was poor at mental arithmetic. Ms[.] Bittner's interpretation of proverbs was superficial and literal and her reasoning was concrete. As a result, Ms[.] Bittner's formal judgment was marginal.
>
> Testing indicates that Ms[.] Bittner functions in the low average range of cognitive abilities. She displayed an intact vocabulary and fund of general information along with some capacity to deal with abstract material. Ms[.] Bittner was very poor at mental arithmetic and quantitative facts. She was readily able to initiate and maintain verbal responses, but was very poor at the initiation and maintenance of motor responses. This does not bode well for her continuing to drive at this time. Ms[.] Bittner had some difficulty in registering and recalling new material.
>
> Ms[.] Bittner has testamentary capacity and could make an informed decision about who she would want to assist her in handling her own affairs and make suggestions as to how she would want her assets used on her behalf. She has the capacity to live independently in her home for the time being and make daily decisions about activities, foods she wants to eat and clothes she wants to wear. Ms[.] Bittner's presentation during this evaluation, as well as her performance on objective testing indicates problems in consistently being able to initiate and carry out the tasks necessary to effectively manage her financial affairs. She has poor registration and recall, as well as poor arithmetic and quantitative skills which negatively impact her ability to be able to independently manage her financial resources.

His report concluded with the following recommendations:

> 1. Ms[.] Bittner has cognitive impairments brought about by Vascular Dementia, but not at a level of severity to be considered a Legally Incapacitated Person who requires the assistance of a Conservator to preserve her assets and assist her with her financial affairs.

> 2. Ms[.] Bittner has testamentary capacity and could make an informed decision about who she would want to handle her affairs and give some direction as to how she would want her assets used on her behalf.
>
> 3. Ms[.] Bittner has made arrangements for her daughter, Stac[e]y Bittner, to assist her with financial matters. This is within her current decision making capacity. It will probably be in her best interest to have someone who can provide her with checks and balances and support in the conduct of her financial affairs.

The probate court entertained argument regarding the conservatorship petition, granted it, and appointed Stacey as conservator. The court's bench opinion discredited Dr. Rudolph's recommendations, finding his opinions tainted by his inaccurate assumption that the standard at issue mirrored that for declaring a person "legally incapacitated." "[I]n my mind," the court elaborated, "he's talking about a legally incapacitated person as that term is defined in Section 1105 [MCL 700.1105(i)] meaning a person who is incapacitated so as to require the assistance of a Guardian. The standards for a Conservator are different."

The court then turned to the first factual requirement for appointment of a conservator, that an individual is "unable to manage property and business affairs effectively" for reasons such as mental illness and mental deficiency. Dr. Rudolph's report, the court emphasized, supports that Shirley falls within this rubric:

> This is what Dr. Rudolph says on page 5, "Ms. Bittner's presentation during this evaluation, as well as her performance on objective testing indicates problems consistently being able to initiate and carry out the tasks necessary to effectively manage her financial affairs." He may not admit to it, but he nails the statutory language directly.

> He says that she has problems in being able to initiate and carry out the tasks necessary to effectively manage her financial affairs.

The court further noted Dr. Rudolph's findings that Shirley had " 'poor registration and recall,' " " 'poor arithmetic and quantitative skills,' " marginal judgment, and low-average cognitive abilities. "For all of those reasons," the court concluded, "I find that the condition here for Shirley Bittner fits squarely into Section 5401(3) (a) [MCL 700.5401(3)(a)], which is that the individual is unable to manage property and business affairs effectively. So, I will appoint a Conservator."

The conservatorship order grants Stacey Bittner "authority with respect to all assets of the estate," requires the filing of an annual account, forbids the sale, assignment, transfer or mortgage of any real estate without written court order, and prohibits the sale, "transfer, discount, assign[ment]" or encumbrance of any annuity or life insurance policies in which Shirley has an interest, absent a court order. On Shirley's behalf, Stacey now appeals the conservatorship order. Suzanne has filed a brief defending the conservatorship.

II

We review a probate court's appointment or removal of a fiduciary for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1, 11; 349 NW2d 247 (1984). An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, the probate court's findings of fact are reviewed for clear error. *In re Townsend Conservatorship*, 293 Mich App 182, 186;

809 NW2d 424 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. We review issues of statutory interpretation de novo. *Id*.

III

As a preliminary matter, we dispense with Suzanne's contentions that Stacey lacks standing to pursue this appeal and that because Stacey filed her claim of appeal more than 21 days after entry of the conservatorship order we should have dismissed it. Suzanne raised both arguments in a previously filed motion to dismiss. This Court held that pursuant to MCR 7.204(A)(3), the claim of appeal was timely filed. With respect to standing, this Court found that Suzanne had not established that Stacey lacked standing to bring this appeal in her capacity as conservator.[1] The law-of-the-case doctrine precludes this Court from revisiting these same issues. See *People v White*, 307 Mich App 425, 428-429; 862 NW2d 1 (2014). In any event, pursuant to MCR 2.201(B)(1), a conservator "may sue in his or her own name without joining the party for whose benefit the action is brought." Thus, a conservator may file an appeal on behalf of his or her ward without naming the ward as an appellant.

IV

Our consideration of Shirley's challenge to the probate court's order starts with the section of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., setting forth the standards govern-

[1] *In re Bittner Conservatorship*, unpublished order of the Court of Appeals, entered October 10, 2014 (Docket No. 320688).

ing conservatorship appointments. Under MCL 700.5401(1), the court "*may* appoint a conservator or make another protective order" (emphasis added) if the court determines that *both* of the following criteria are satisfied:

> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. [MCL 700.5401(3).]

These prerequisites must be established by clear and convincing evidence. MCL 700.5406(7). The clear-and-convincing-evidence standard is "the most demanding standard applied in civil cases . . . ." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing proof

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (quotation marks and citations omitted; alterations in original).]

Furthermore, in fashioning a conservatorship order,

> [t]he court shall exercise the authority conferred in [Part 4 of Article V of EPIC, MCL 700.5401 through MCL 700.5433] to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent neces-

> sitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure. [MCL 700.5407(1).]

We agree that Dr. Rudolph likely conflated the standards for imposing a conservatorship and for appointing a guardian for a legally incapacitated person. We also agree with the probate court that clear and convincing record evidence substantiated that Shirley's cognitive impairments give rise to " 'problems consistently being able to initiate and carry out the tasks necessary to effectively manage her financial affairs.' " But this finding, standing alone, does not clearly and convincingly evidence a need for conservatorship.

The plain language of MCL 700.5401(3)(a) requires a determination that an "individual is unable to manage property and business affairs effectively," and that this disability arises from causes such as "mental illness" or "mental deficiency." We first consider whether clear and convincing evidence substantiated that Shirley Bittner was "unable" to perform the tasks necessary to "effectively" care for her assets.

Dr. Rudolph's finding meets this statutory criterion only to the extent that it demonstrates intermittent "problems" with Shirley's ability to effectively manage her finances. Whether Dr. Rudolph would find Shirley consistently *unable* to conscientiously and competently manage her affairs remains unknown; Dr. Rudolph never addressed this specific question. Although Dr. Rudolph observed that Shirley has "problems in consistently" initiating and carrying out tasks relevant to her finances, he rendered no opinion regarding the real question: do Shirley Bittner's mental "deficien[cies]" render her "unable" to act as a responsible custodian for her funds? The sentence

immediately following Dr. Rudolph's pronouncement regarding Shirley's "problems in consistently" initiating and carrying out pertinent tasks states: "She has poor registration and recall, as well as poor arithmetic and quantitative skills which *negatively impact* her ability to be able to independently manage her financial resources." (Emphasis added.) But do the problems that "negatively impact" Shirley's abilities rise to a level that render her "unable" to think and act appropriately regarding her finances?

The evidence supporting a finding of "inability" must be clear and convincing. Here, the probate court inferred that Dr. Rudolph would agree with the probate court's interpretation of Dr. Rudolph's findings. Given the demanding standard of proof applicable in this case, we are not so sure.

Difficulties with math and memory plague many elderly (and not so elderly) individuals. These irksome attendants to the aging process are not necessarily disabling. Poor subtraction skills and relatively low cognitive-ability testing scores hardly render a person mentally ill or mentally deficient, or even incapable of making rational decisions regarding one's bounty. In our view, clear and convincing evidence that a person "is unable to manage property and business affairs effectively" requires more than low marks on arithmetic or memory tests, or inconsistent ineptitude in balancing a checkbook. MCL 700.5401(3)(a). Further, that Shirley recognized her intellectual shortcomings and sought out Stacey's assistance demonstrates effective management skill rather than disability. We find the arrangement Stacey and Shirley made akin to an attorney's employment of support staff and electronic "tickler" notes to manage a caseload, or to a patient's use of pill boxes and telephonic reminders to manage a

medical regimen. The evidence substantiates that Shirley pays her bills on time, lives within her means, satisfactorily manages her household, and (according to both Phillips and Dr. Rudolph) maintains an adequate ability to make responsible decisions. That Shirley detected Suzanne's alleged theft of Shirley's money, arranged for Stacey's assistance with her finances, and sought an accounting bespeaks her intellectual competence. Accordingly, we are left with a definite and firm conviction that the probate court erred by finding that clear and convincing evidence satisfied MCL 700.5401(3)(a).

But even assuming that the probate court correctly concluded that clear and convincing evidence established Shirley's inability to manage her property and business affairs effectively, the probate court made no findings regarding MCL 700.5401(3)(b), which addresses whether Shirley's property "will be wasted or dissipated unless proper management is provided . . . ." Nor does clear and convincing evidence of record substantiate this prong of MCL 700.5401(3). Indeed, the evidence preponderates to the contrary.

The only evidence suggesting waste or dissipation of assets is that Suzanne, not Shirley, improperly transferred funds. We find no indication that under Shirley's management, money or property was mishandled. Rather, the record supports that Shirley responsibly sought Stacey's assistance and granted her a power of attorney. No facts presented to the probate court even hinted at fiscal mismanagement under this regime. As Phillips noted, the "safeguards in place with the [power of attorney] and daughter Stac[e]y's help" weigh against a conservatorship. Despite Shirley's age-related mental infirmities, her financial affairs are in good order and well-controlled with Stacey's

assistance. Thus, this record demonstrates that the necessary prerequisites for a conservatorship have not been fulfilled.

Further, we observe that the probate court failed to take into account the Legislature's command that it "shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure." MCL 700.5407(1). This subsection of EPIC has yet to be construed by an appellate court. A comment to MCL 700.5407 by the reporter for the EPIC drafting committee of the State Bar of Michigan provides, "Subsection (1) states a public policy that the court's authority over an adult's assets and financial affairs should be the least intrusive possible while still providing needed protection. This policy is stated in numerous places throughout Part 4 of Article V." Martin & Harder, *Estates and Protected Individuals Code With Reporters' Commentary* (ICLE, February 2015 update), p 401. In a similar vein, the "Reporter's Comment" to MCL 700.5401 adds:

> It is important to appreciate that the court may provide assistance in alternative ways. Either a conservator may be appointed, or the court, without appointing a conservator, may issue an order of protection authorizing, directing, or ratifying some action for the management or protection of the individual's assets. The alternative approaches are available both for minors and for adults in need of protection. For adults, an order of protection without appointing a conservator may be consonant with the direction in MCL 700.5407(1) for the court to be as minimally intrusive as possible. [*Id*. at 394.]

"While not binding," the reporter's comments concerning EPIC may "aid in the interpretation of a statute or rule." *In re Lundy Estate*, 291 Mich App 347, 355; 804 NW2d 773 (2011).

We draw from these sources the principle that when considering a petition for conservatorship, a probate court should approach the task from a perspective of respect for the individual's right to acquire, enjoy, and dispose of his or her property as the individual sees fit. Any restrictions on this fundamental right must be narrowly tailored to the individual's specific capabilities and incapacities, bearing in mind the heightened evidentiary threshold for judicial interference. EPIC provides a probate court with tools for crafting orders that balance personal rights with demonstrated needs for protection. MCL 700.5408(1) provides, in relevant part:

> If it is established in a proper proceeding that a basis exists as described in [MCL 700.5401] for affecting an individual's property and business affairs, the court, *without appointing a conservator*, may authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of money or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, contract for life care, deposit contract, or contract for training and education; or an addition to or establishment of a suitable trust. [Emphasis added.]

MCL 700.5419(1) allows for the creation of a limited conservatorship "specifying that only a part of the protected individual's property vests in the conservator . . . ." Read together, MCL 700.5407(1), MCL 700.5419(1), and MCL 700.5408 mandate that a court carefully and thoughtfully consider whether arrange-

ments less intrusive than a conservatorship will adequately protect an individual's property as well as his or her autonomy.

Here, the evidence presented to the probate court established that Shirley's financial affairs were in good order and well-managed through her arrangement with Stacey. Although Shirley exhibited some deficits in memory, math, motor skills, and executive functioning, she understood her sources of income and economic responsibilities. Shirley's grant of a durable power of attorney to Stacey confirms rather than negatives her ability to effectively manage her property and business affairs. We are definitely and firmly convinced that the probate court erred by finding that the evidence satisfied that a conservatorship was appropriate under MCL 700.5401(3).

We reverse the order establishing a conservatorship and appointing a conservator, and remand for further proceedings. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and STEPHENS, J., concurred with GLEICHER, J.

PERKOVIC v ZURICH AMERICAN INSURANCE COMPANY

Docket No. 321531. Submitted September 1, 2015, at Detroit. Decided September 10, 2015, at 9:00 a.m. Leave to appeal sought.

Dragen Perkovic was injured in a motor vehicle accident in February 2009, and he filed a complaint in the Wayne Circuit Court against a number of parties, including Zurich American Insurance Company, Citizens Insurance Company, and Hudson Insurance Company. At the time of the accident, plaintiff was driving a semi-truck he owned and leased to a company that insured the vehicle with Zurich. Plaintiff's personal vehicles were insured by Citizens, and plaintiff had a bobtail policy with Hudson. The court, Michael F. Sapala, J., granted Zurich's motion for summary disposition and ultimately dismissed plaintiff's claims against Citizens after determining that Hudson was the highest priority insurer. The Court of Appeals determined that defendant had priority over Hudson, and plaintiff's claims against Hudson were dismissed. *Perkovic v Hudson Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2012 (Docket No. 302868). Plaintiff's claim against Zurich proceeded. The trial court, Maria Oxholm, J., granted Zurich's motion for summary disposition under MCR 2.116(C)(7) because plaintiff failed to provide Zurich with the notice required by MCL 500.3145(1) before the period of limitations expired. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court properly granted Zurich's motion for summary disposition under MCR 2.116(C)(7) because plaintiff failed to give Zurich proper notice of his injury within one year after the accident that caused it. MCL 500.3145(1) requires that a claim for personal protection insurance (PIP) benefits be commenced no later than one year after the date of the accident causing injury unless (1) the claimant gives written notice of the injury within one year of the accident, or (2) the insurer has made a previous payment of PIP benefits for the injury. If the claimant gives proper written notice to the insurer, he or she may commence an action against the insurer within one year after incurring the most recent allowable expense. Benefits are recoverable only for one year before the date on which the action was commenced. In

this case, plaintiff's notice of injury did not satisfy the requirements of MCL 500.3145(1) and so did not toll the one-year period of limitations for commencing the action. Because plaintiff did not file his complaint against Zurich within one year of the accident, and because his notice to Zurich was not sufficient to toll the period of limitations, the trial court appropriately granted Zurich's motion for summary disposition.

2. Receipt of plaintiff's medical records and the bill for plaintiff's medical treatment did not adequately alert Zurich to the possibility that a claim would be made for payment of PIP benefits. In this case, the medical facility that treated plaintiff after the accident sent to Zurich plaintiff's medical records and a bill for plaintiff's treatment for the purpose of obtaining payment. The bill included plaintiff's name as the insured and his address, and plaintiff's medical records indicated that he was injured on a certain date, the nature of his injuries, and that he was admitted to the medical facility that treated him. Until an insurer receives written notice alerting it to a potential claim by an insured, the insurer has no way of knowing whether it should begin an investigation into the accident and make a determination of the expenses incurred and whether those expenses are covered losses. The medical facility's submission to Zurich of plaintiff's medical records and the facility's bill for treating plaintiff's injuries did not constitute the written notice required by MCL 500.3145(1) because it did not alert Zurich to a potential claim by plaintiff for no-fault benefits.

Affirmed.

Mark Granzotto, PC (by *Mark Granzotto*), and *Law Offices of Michael J. Morse, PC* (by *Donald J. Cummings*), for Dragen Perkovic.

Dean & Fulkerson, PC (by *James K. O'Brien* and *James M. Dworman*), for Zurich American Insurance Company.

Before: TALBOT, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. Plaintiff Dragen Perkovic, appeals as of right an order granting summary disposition to defendant Zurich American Insurance Company. We affirm.

This case arises out of a motor vehicle accident that occurred on February 28, 2009. Plaintiff was the driver and owner of a semi-truck, which he leased to E.L. Hollingsworth and Company (Hollingsworth) under an independent contractor's operating agreement. Hollingsworth had an automobile insurance policy with defendant that covered Hollingsworth's equipment and the vehicles it leased. Plaintiff also had a personal automobile insurance policy through Citizens Insurance Company (Citizens) and a bobtail insurance policy through Hudson Insurance Company (Hudson) for occasions on which the vehicle was not being operated for Hollingsworth.

On February 28, 2009, while plaintiff was driving down an interstate, the car in front of plaintiff began to spin, and plaintiff swerved to avoid the car. As a result, plaintiff drove his truck into a wall. Plaintiff subsequently received emergency medical treatment at The Nebraska Medical Center.

On April 30, 2009, James White, a custodian of records for The Nebraska Medical Center, mailed to defendant plaintiff's medical records and a medical bill for services performed on plaintiff. According to White's affidavit, White sent the medical bill and plaintiff's medical records on behalf of plaintiff in order to obtain payment for plaintiff's accident-related injuries. The medical bill listed "Dragen Perkovic" under the "Insured's Name" and included plaintiff's address of 3472 South Blvd., Bloomfield Hills, MI 48304. Plaintiff's medical records also included plaintiff's name as the insured, his address, and a policy number. Plaintiff's medical records stated:

> 46 yo male semi truck driver c/o R upper back pain after MVC. States that he was driving down interstate when

> car in front of him began to spin[,] he swerved to avoid the car since in semi and ran into a wall hitting front[]driver side.

Plaintiff's medical records further stated that plaintiff may have suffered a "back sprain, cervical sprain or fracture, chest wall contusion, contusion, head injury, liver injury, myocardial contusion, pneumothorax, splenic injury, sprained or fractured extremity."

On May 19, 2009, defendant sent notice to The Nebraska Medical Center indicating that it was denying payment for the services rendered to plaintiff. Defendant stamped the statement, "No injury report on file for this person," on the medical bill for the services performed on plaintiff.

As stated in the trial court's opinion granting summary disposition:

> On August 11, 2009, Plaintiff filed his Complaint against Citizens. On February 12, 2010, Plaintiff amended his Complaint to add Hudson, Business Insurers of America, Inc.[,] BIA Associates, Inc.[,] and Forsyth/BIA, Inc.[,] as defendants. On March 23, 2010, defendants Business Insurers of America, Inc., BIA Associates, Inc.[,] and Forsyth/BIA, Inc[.,] were voluntarily dismissed from this lawsuit. It was not until March 25, 2010, more than a year after the accident, that Plaintiff filed his Second Amended Complaint adding Zurich as a defendant. The Michigan Department of State Assigned Claim Facility was also added as a defendant on December 9, 2010, but was dismissed from the lawsuit on May 18, 2011.
>
> On September 9, 2010, in its Opinion and Order, the Honorable Michael F. Sapala granted Zurich's motion for summary disposition, dismissed Hudson and named Citizens the highest priority insurer. Subsequently, Citizens filed a motion for reconsideration, which was granted on November 8, 2010. In its Opinion and Order, Judge Sapala dismissed Citizens and named Hudson the highest priority insurer. Thereafter, Hudson filed a motion for recon-

> sideration. The motion was denied in a February 11, 2011 Opinion and Order which confirmed Hudson had priority over Zurich and dismissed all claims against Citizens.
>
> On December 20, 2012, the Michigan Court of Appeals reversed this Court's decision, ruling that Zurich is the highest priority insurer, and dismissed all claims against Hudson.[1] The court held that MCL 500.3114(3) applied in this case and upheld Hudson's exclusion of coverage provision reasoning that, because Zurich provided coverage, the Hudson and Zurich policies together provided Plaintiff with continuous coverage. Zurich's application for leave to appeal was denied on April 29, 2013.[2]

On August 7, 2013, defendant filed a motion for summary disposition under MCR 2.116(C)(7) because the statute of limitations in MCL 500.3145 required dismissal of plaintiff's claim. Defendant claimed that it had not received within one year immediately following plaintiff's accident any written notice of injury, and that plaintiff had not been paid any benefits.

On October 2, 2013, plaintiff filed a response to defendant's motion for summary disposition. Plaintiff contended that he complied with the notice requirement when White sent The Nebraska Medical Center medical bill and plaintiff's medical records to defendant on April 30, 2009. The medical bill and records were in written form and specifically stated plaintiff's address and the nature of plaintiff's injury.

On October 3, 2013, defendant filed a reply to plaintiff's response to defendant's motion for summary disposition. Defendant argued that the medical records sent to it were insufficient notice because nothing in the medical records indicated that plaintiff intended to

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[1] See *Perkovic v Hudson Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2012 (Docket No. 302868).

[2] See *Perkovic v Hudson Ins Co*, 493 Mich 971 (2013).

make a claim for personal protection insurance benefits. Moreover, the mailing was not from plaintiff, was not sent on plaintiff's behalf, and was not even known about by plaintiff.

On October 4, 2013, the trial court heard arguments on defendant's motion for summary disposition, and the parties' arguments were consistent with their briefs. On February 20, 2014, the trial court entered an order granting defendant's motion for summary disposition. The trial court first distinguished *Lansing Gen Hosp, Osteopathic v Gomez*, 114 Mich App 814; 319 NW2d 683 (1982), stating that "[t]here was no question in *Gomez* that the agent was providing the notice with the intent to file a claim." The trial court then stated:

> Turning to the case at bar, the Court notes that Mr. White's affidavit states that the bill and records were sent to Zurich on behalf of Plaintiff ***to obtain payment for his accident related injuries***. This is different and distinguishable from sending a notice of injury for the purpose of opening a claim for personal injury protection no-fault benefits on behalf of Plaintiff. Furthermore, there was no additional document enclosed or statement written on the medical records, which would indicate any intention to file a claim on Plaintiff's behalf. Moreover, there is no evidence that Plaintiff even had any knowledge that the Nebraska Medical Center billed Zurich for the services it rendered. Had Plaintiff authorized the Nebraska Medical Center to send a notice of intent to file a claim, or even had knowledge that a notice was sent, the fact that Plaintiff would have had an open claim with Zurich would have been alleged in his Second Amended Complaint adding Zurich to the instant lawsuit. However, the Second Amended Complaint provides that "A Claim Number has not yet been assigned by Defendants or is currently unknown."
>
> Likewise, had the Nebraska Medical Center been tasked with the duty to provide notice of intent to file a claim on Plaintiff's behalf, it would have certainly commu-

> nicated with either Zurich, providing them with a sufficient notice, or with Plaintiff, letting him know that no claim for personal protection insurance benefits had been opened, after receiving notice from Zurich that no injury report existed for Plaintiff.
>
> Therefore, the Court finds that a medical care provider sending bills and corresponding medical records to obtain payment for the services it rendered to the injured individual does not satisfy the requirements of MCL 500.3145. The purpose of sending the notice is to file a claim, not to obtain payment. Allowing unexplained bills and medical records, without more, to serve the notice requirements of MCL 500.3145 would defeat the purpose of the statute, as medical providers would have an incentive to bill every possible insurance company to increase their chance of getting paid for the services they render to an injured person. This, in turn, would place an undue burden on insurance companies to investigate every bill sent to them by a medical provider when there is no existing claim or injury report for the injured individual named on the bill. Accordingly, the Court holds that there has to be some evidence that Plaintiff, or someone on his behalf, is intending to file a claim for personal protection insurance benefits for the notice requirement to be satisfied. [Citation omitted.]

Thereafter, plaintiff filed a motion for reconsideration, which the trial court denied.

On appeal, plaintiff contends that the trial court erred by granting summary disposition to defendant because there is no requirement that the documents be sent with the intent to file a claim; therefore, plaintiff argues that he provided sufficient notice under MCL 500.3145(1). We disagree.

A grant or denial of summary disposition is reviewed de novo. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). When deciding whether a motion for summary disposition under MCR 2.116(C)(7) was properly decided, we must "consider all documentary evidence

and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Id*. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010).

MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005), the Michigan Supreme Court explained:

> [Section] 3145(1) contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered:

> (1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.
>
> (2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
>
> (3) Recovery is limited to losses incurred during the one year preceding commencement of the action. [Citation omitted.]

The Court recognized that the language of the statute "must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." *Id*. at 582.

In this case, the medical bill and plaintiff's medical records listed "Dragen Perkovic" as the "insured" and provided his address of "3472 South Blvd, Bloomfield Hills, MI 48304." The medical records also indicated that Dragen Perkovic was the person injured, that he was admitted to The Nebraska Medical Center in Omaha, Nebraska, at 12:03 p.m. on February 28, 2009, after a motor vehicle accident that occurred on the interstate, and that he may have suffered a "back sprain, cervical sprain or fracture, chest wall contusion, contusion, head injury, liver injury, myocardial contusion, pneumothorax, splenic injury, sprained or fractured extremity." Thus, the notice provided plaintiff's name and address, and it indicated in ordinary language the name of the person injured and the time, place, and nature of his injury. Additionally, the medical bill and medical records were given to defendant within one year after the accident: the accident occurred on

February 28, 2009, and the medical bill and medical records were sent to defendant on April 30, 2009.

Defendant, however, contends that the requirement in MCL 500.3145(1) that the notice be made "by a person claiming to be entitled to benefits therefor, or by someone in his behalf," means that the information must convey the intent to make a claim for PIP benefits. Defendant cites an unpublished decision that relied on the Michigan Supreme Court's decision in *Welton v Carriers Ins Co*, 421 Mich 571, 579-580; 365 NW2d 170 (1984), overruled in part by *Devillers*, 473 Mich at 577, 581.[3] In *Welton*, the Michigan Supreme Court required the plaintiff to make a specific claim for personal protection insurance benefits to trigger tolling of the one-year-back rule set forth in MCL 500.3145 because "something more than a general notice of injury [was required to toll the one-year-back rule]." *Devillers*, 473 Mich at 576. The *Welton* Court stated that "[u]ntil a specific claim is made, an insurer has no way of knowing what expenses have been incurred, whether those expenses are covered losses and, indeed, whether the insured will file a claim at all." *Welton*, 421 Mich at 579. However, *Welton* involved the tolling of the one-year-back rule, which is not at issue here, and, in fact, is no longer permitted. *Devillers*, 473 Mich at 593. Thus, the analysis from *Welton* is not applicable in this case.

Regarding the notice provision enabling claimants to extend the period for recovery of personal protection insurance benefits up to one additional year, which is at issue in this case, this Court explained in *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 128; 290 NW2d 408 (1980):

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[3] *Devillers* overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), which had adopted the rule from *Welton*.

> The policy and purposes such statutes are intended to serve have been stated thus:
>
> > Statutes of limitations are intended to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; to relieve a court system from dealing with stale claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and to protect potential defendants from protracted fear of litigation.
>
> Notice provisions have different objectives than statutes of limitations:
>
> > Notice provisions are designed, *inter alia*, to provide time to investigate and to appropriate funds for settlement purposes.
>
> In light of these objectives, and the existence in a single statutory provision of both a notice provision and a limitation of action provision, we conclude that substantial compliance with the written notice provision which does in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund, is sufficient compliance under § 3145(1). [Quotation marks and citations omitted.]

In *Dozier*, the plaintiffs' attorney sent a letter to the defendant indicating that he had been retained to represent the plaintiffs regarding the injuries one of the plaintiffs sustained "in the accident of June 9th" and claiming "a lien on any and all settlements in regard to this accident." *Id*. at 124. This Court indicated that the letter informed the defendant of the accident, and because the credibility of the letter was untainted, it provided the defendant with adequate warning to permit it to conduct an investigation of the matter. *Id*. at 129-130. However, because the letter did "[not] indicate in ordinary language the place and nature of [the] injury, defendant [wa]s denied knowl-

edge of the essential facts upon which its liability depend[ed] and therefore [it could not] appropriate funds for settlement purposes." *Id*. at 130. Nonetheless, the Court did not actually decide whether the notice was sufficient because it concluded that the defendant had waived its right to assert the insufficiency of the notice. *Id*.

In *Walden v Auto Owners Ins Co*, 105 Mich App 528, 530; 307 NW2d 367 (1981), the plaintiff orally reported the accident in which he was involved to his insurance agent who filled out an "Auto Accident Notice" form and transmitted it to the defendant. This Court held that the notice was not fatally defective because the injury section was not completed. *Id*. at 534. Citing *Dozier*, the Court concluded that "the accident form was even more complete in that it gave the name and address of the claimant, the time and place of the vehicular accident, and specified that plaintiff rolled over while in his truck." *Id*.

Similarly, in *Gomez*, 114 Mich App at 819, the policyholder orally notified his insurance agent about the accident involving his vehicle, and the agent provided written notice to the defendant. This Court held that the written notification describing the time and the place of the accident was sufficient even though the notice did not name the claimant because he could not be located. *Id*. at 823, 825. The Court concluded that the written notification, describing the time and place of the accident, was sufficient to provide time for the defendant to investigate the accident. *Id*. at 825.

In *Heikkinen v Aetna Cas & Sur Co*, 124 Mich App 459, 461; 335 NW2d 3 (1983), the plaintiff's husband died after being overcome by the exhaust fumes of his vehicle. The plaintiff was insured by the defendant and obtained a policy through an agent who also prepared

income tax returns. *Id*. The plaintiff provided the insurance agent with a copy of her husband's death certificate for purposes of preparing her tax return. *Id*. She argued that the death certificate constituted notice under MCL 500.3145(1). *Id*. at 463. Analyzing *Dozier*, the Court stated that "[t]he letter in *Dozier*, although not strictly complying with the contents requirements of notice, did fulfill the purposes of the limitations and notice provisions of the statute." *Id*. The Court stated:

> The instant case involves a mirror image of the *Dozier* facts. Plaintiff had strictly complied with the contents requirements for notice but did not fulfill the purposes of the limitations and notice provisions of § 3145(1). The death certificate received by Mr. Gilmore contained all the requisite information but it was not presented to him under circumstances indicating that a claim in connection with the death might be asserted. Mr. Gilmore was preparing plaintiff's tax return. No discussions concerning the policy were held at this time or any other time. Although plaintiff had previously informed Mr. Gilmore of her husband's death, she stated this was for the purpose of removing her husband's name from the policy of insurance. She did not indicate she was asserting a claim and in fact testified that she was unaware of the existence of any claim either at the time of the telephone call or at the time the death certificate was presented for purposes of preparing the tax return. Under these circumstances, Mr. Gilmore was not apprised of the need to investigate and appropriate funds nor of the need to inform Aetna to do so.
>
> Notice encompasses something more than words typed on a piece of paper. The words should be presented in a form, or under circumstances, designed to *in fact* apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund.
>
> The death certificate presented in connection with preparation of the plaintiff's tax return, although sufficient in content, did not fulfill the purposes of the statute. Therefore, the death certificate did not constitute notice

> under the statute. The trial judge did not err in granting defendant's motion. [*Heikkinen*, 124 Mich App at 463-464 (quotation marks and citation omitted).]

In *Joiner v Mich Mut Ins Co*, 137 Mich App 464, 470; 357 NW2d 875 (1984), this Court recognized that prior decisions of the Court had held "that where the no-fault insurer and the workers' compensation insurer are the same entity, notice of a workers' compensation claim does not necessarily satisfy the notice requirements of § 3145(1), where the notice is not likely to alert the insurer to the pendency of a possible no-fault claim." In one prior decision, this Court stated that "mere notice of an injury under circumstances unrelated to a possible claim for no-fault benefits does not trigger the insurer's investigative procedures nor does it advise the insurer of the need to appropriate funds for settlement." *Id*. at 471. However, in *Joiner*, the plaintiff's complaint with the Insurance Bureau contained a handwritten statement indicating that the plaintiff had filed for both no-fault benefits and workers' compensation benefits. *Id*. at 471-472. The complaint also clearly stated that the accident involved a motor vehicle. *Id*. at 472. Thus, the Court held "that the complaint was designed to and did in fact apprise defendant of the pendency of a possible no-fault claim." *Id*.

This Court does not always require strict, technical compliance with the requirements of MCL 500.3145(1), and in *Dozier*, *Walden*, and *Gomez*, there was no indication that the defendants were unaware of a possible no-fault claim. The defendants in those cases were sent either a letter or a written notice form. See *Gomez*, 114 Mich App at 819; *Walden*, 105 Mich App at 530; *Dozier*, 95 Mich App at 124. We agree with the trial court that "[t]here was no question in *Gomez* that

the agent was providing the notice with the intent to file a claim." This is similarly true in *Dozier* and *Walden*.

In this case, however, no letter or written notice form was sent that would alert defendant to the possible pendency of a no-fault claim. Rather, the medical bill and medical records were sent to defendant without any indication of a possible claim. In fact, according to White, the bill and records were sent for the purpose of obtaining payment. This notice of injury, which was unrelated to a possible claim for no-fault benefits, did not trigger defendant's investigative procedures or advise defendant of the need to appropriate funds for settlement. See *Joiner*, 137 Mich App at 471. Similar to the death certificate in *Heikkinen*, 124 Mich App at 464, the medical bill and medical records, although sufficient in content, did not fulfill the purposes of the statute. Accordingly, plaintiff did not provide sufficient notice pursuant to MCL 500.3145(1), and the trial court properly granted summary disposition in favor of defendant.

Affirmed. As the prevailing party, defendant may tax costs under MCR 7.219.

TALBOT, P.J., and FORT HOOD, J., concurred with WILDER, J.

WALEGA v WALEGA

Docket No. 321721. Submitted September 1, 2015, at Detroit. Decided September 10, 2015, at 9:05 a.m.

Charles Walega filed an action in the Macomb Circuit Court against Kathleen Walega, State Farm Mutual Automobile Insurance Company, and Farm Bureau Insurance Company for no-fault benefits after he was seriously injured when a gun safe weighing more than 1,500 pounds fell onto his left leg as the safe was being dragged behind, or loaded onto, plaintiff's truck. Plaintiff filed a motion for summary disposition, and the circuit court, Mark S. Switalski, J., granted the motion, ruling that plaintiff was entitled to personal protection insurance (PIP) benefits for his injury regardless of whether the safe was being dragged behind or loaded onto the truck. The court denied Farm Bureau's motion for reconsideration and entered a stipulated judgment for plaintiff, subject to defendant's reservation of its right to appeal the judgment. Farm Bureau appealed.

The Court of Appeals *held*:

The trial court properly granted plaintiff's motion for summary disposition because plaintiff's injury was closely related to the truck's use as a motor vehicle as is required for the recovery of PIP benefits under the no-fault act. An insured individual is entitled to PIP benefits when his or her injury has a causal connection to the use of a motor vehicle as a motor vehicle. Using a truck to move an item is a normal and foreseeable use of the truck, and it was undisputed that the truck was being driven in order to move the safe when plaintiff was injured. Therefore, plaintiff's injury resulted from the use of his truck as a motor vehicle. Whether the safe was being pulled by a rope attached to the truck's trailer hitch, or was partially loaded onto the truck's bed when it fell, is not dispositive. Plaintiff was entitled to PIP benefits no matter whether the safe fell after striking an uneven portion of the driveway pavement as it was being dragged behind the truck or the safe fell off the truck bed when the truck accelerated. Under either of these circumstances, the truck was moving at the time of plaintiff's injury and was thus quite obviously engaged in a transportational function.

Affirmed.

NO-FAULT INSURANCE — PIP BENEFITS — CIRCUMSTANCES OF INJURY — USE OF A MOTOR VEHICLE AS A MOTOR VEHICLE.

An insured individual injured by an object on or attached to a motor vehicle is entitled to Personal Protection Insurance benefits when his or her injury is closely related to the motor vehicle's use as a motor vehicle; using a truck to transport an item is a normal and foreseeable use of the truck, and a truck moving on a driveway is clearly engaged in a motor vehicle's transportational function.

Lipton Law, PC (by *Chris Camper* and *Kyle J. Kelly*), for Charles Walega.

Willingham & Coté, PC (by *Kimberlee A. Hillock*, *John A. Yeager*, and *Troy D. Clarke*), for Farm Bureau Insurance Company.

Before: TALBOT, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. In this action for no-fault benefits, defendant Farm Bureau Insurance Company appeals as of right a stipulated order entering judgment for plaintiff, Charles Walega, in the amount of $75,000. The stipulated order preserved defendant's right to appeal the trial court's grant of summary disposition in favor of plaintiff and the trial court's denial of defendant's motion for reconsideration. Because we conclude that plaintiff's injury arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, we affirm.

On November 2, 2011, plaintiff, with the assistance of his wife, Kathleen Walega, was moving a gun safe that weighed more than 1,500 pounds. It is undisputed that plaintiff's truck was being used to help move the safe. However, there is a factual dispute regarding how the safe was being moved and the location of the safe at the time the injury occurred.

According to defendant, the safe had been attached to the truck's trailer hitch by a rope, but was still on

the ground while it was being moved. Defendant relies on medical records, as well as a statement posted on Facebook by Kathleen after the accident, which indicate that Kathleen was driving the truck with the safe attached to the trailer hitch by the rope. While the truck was dragging the safe out of the garage onto the driveway, the safe struck uneven concrete, causing it to flip over and land on plaintiff's leg. Plaintiff and Kathleen, however, testified at their depositions that the safe was already partially loaded onto the bed of the truck, and that when the truck hit the uneven portion of the driveway, the safe fell out of the truck and onto plaintiff's leg.

Under either scenario, it is undisputed that the truck was being driven by Kathleen at the time the safe fell and landed on plaintiff's leg. It is also undisputed that following the injury, plaintiff underwent multiple surgeries before his left leg was eventually amputated below the knee.

On March 2, 2012, plaintiff sought personal protection insurance (PIP) benefits from defendant. In seeking the benefits, plaintiff claimed that the injury occurred when Kathleen accelerated the truck over the pavement, causing the safe to fall off the bed of the truck. Plaintiff also claimed that even if the rope had broken before the truck had been moved, he would still be entitled to benefits under MCL 500.3106(1)(b).[1] On April 4, 2012, defendant informed plaintiff's attorney that it disagreed that plaintiff would be entitled to PIP benefits if the fall occurred during "preparation for

[1] MCL 500.3106(1)(b) indicates that accidental bodily injury may "arise out of the ownership, operation, maintenance, or use of a parked vehicles as a motor vehicle" if "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process."

loading and before loading itself." Defendant also noted factual discrepancies regarding what occurred, indicated that in the absence of under-oath examination the investigation could not be advanced, and stated that PIP benefits would not be provided because plaintiff had "not provide[d] reasonable proof of coverage of the claim."

Plaintiff initiated the instant lawsuit on October 9, 2012. Following discovery and other matters, plaintiff filed his motion for summary disposition under MCR 2.116(C)(10) on September 5, 2013. Plaintiff argued that he was entitled to coverage under MCL 500.3105 because, even under defendant's version of the facts, plaintiff was attempting to tow the safe with the moving truck. Trucks are routinely used to transport heavy objects. Further, the moving truck did not merely represent the location of the injury. Rather, the injury was directly related to the use of the truck as a mode of transportation.

Defendant filed its response on September 16, 2013, arguing that plaintiff's injuries did not arise out of the transportational function of a motor vehicle because the truck was either being used as an immobile anchor point for the rope or was pulling the skidding safe. Defendant claimed that the truck was being used as a tool and was not being driven on a public roadway. Defendant also argued that if the facts of the loss were as stated by Kathleen, then plaintiff made misrepresentations and the policy was void. Accordingly, defendant argued, there was a genuine issue of material fact, and summary disposition was not warranted.

Without holding oral argument, the trial court granted plaintiff's motion for summary disposition, in part, on September 30, 2013. The trial court ruled that

plaintiff was entitled to PIP benefits under either plaintiff's version or defendant's version of events:

> As noted, plaintiff has attributed the accident to the process of loading the safe into his truck. He then planned to drive the safe to a buyer. Under these circumstances, plaintiff would be entitled to PIP benefits. MCL 500.3106(1)(b).
>
> Defendant Kathleen Walega posted a Facebook entry on November 5, 2011 describing the accident as happening while the safe was being moved from the garage. Under this version, plaintiff had tied a rope around the safe and defendant Kathleen Walega was using the truck to pull the safe from the garage so it could be loaded into the truck. As the safe dragged across the driveway, it hit a raised portion of pavement and tipped over onto plaintiff's foot. Under these circumstances, plaintiff would also be entitled to PIP benefits because the truck was being used (i.e., was not parked) to move the safe—even if for a short distance—and the safe was connected to the truck. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998) (coverage applicable if use of vehicle is closely related to its transportational function at time of injury); see also *Block v Citizens Ins Co of America*, 111 Mich App 106; 314 NW2d 536 (1981) (no coverage when accident occurs while carrying items to vehicle and there is no actual connection to vehicle).

The trial court went on to state, however, that defendant's fraud claim, based on allegations that Kathleen changed her story to support plaintiff's version of events, was a defense that had to be decided by a jury. The trial court also concluded that plaintiff's asserted damages were subject to reasonable dispute.

On October 22, 2013, defendant sought reconsideration and clarification of the trial court's order. Defendant argued, *inter alia*, that the trial court did not address the possible use of the motor vehicle as an anchor point and requested clarification based on the

trial court's apparently contradictory ruling that plaintiff was entitled to PIP benefits, but that defendant was entitled to present its fraud defense to a jury.

On November 4, 2013, the trial court denied the motion for reconsideration, noting that defendant's argument was the same as that made in its response to plaintiff's motion for summary disposition and further stating:

> [D]efendant Farm Bureau fails to cite any authority for the proposition that an item must be moved some minimum distance to satisfy the transportational function test for PIP coverage. Moreover, coverage has been afforded for dragging items behind a vehicle. See *Smith v Community Service Ins Co*, 114 Mich App 431; 319 NW2d 358 (1982) (plaintiff injured while riding an inner tube being towed by a motor vehicle entitled to coverage).
>
> As previously noted, the evidence only suggests the safe either fell from the back of a moving truck or tipped over while being dragged by a moving truck. Hence, there was no need to discuss the possible use of the truck as a stationary anchor point or tool.

Finally, the trial court clarified its earlier opinion regarding the fraud defense:

> The subject policy voids coverage if there is an intentionally concealed or misrepresented material fact or circumstance, fraudulent conduct or false statement relating to a loss. Family Auto Policy, Part V, § C.[2] Thus,

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[2] Part V, § C of the relevant policy provides:

> The entire policy will be void if, whether before or after a loss, you, any **family member**, or any **insured** under this policy has:
>
> 1. intentionally concealed or misrepresented any material fact or circumstance;
>
> 2. engaged in fraudulent conduct; or
>
> 3. made false statements;

> defendant Farm Bureau could only void coverage if a *material* fact or statement relating to plaintiff's loss was misrepresented or falsely made. However, as both factual scenarios result in coverage for plaintiff's loss, any misrepresented or false fact or statement was not material to plaintiff's loss. Consequently, defendant Farm Bureau's fraud defense does not preclude summary disposition on the issue of plaintiff's entitlement to PIP coverage and should not have been noted as requiring submission to the jury for resolution.

On May 2, 2014, the parties stipulated to entry of judgment in favor of plaintiff, subject to defendant's reservation of its right to appeal the trial court's ruling on plaintiff's summary disposition motion and on defendant's motion for reconsideration. On May 12, 2014, defendant filed the instant appeal.[3]

On appeal, defendant argues that the trial court erred in concluding that plaintiff was using his truck as a motor vehicle at the time the injury occurred. We disagree.

We review de novo the trial court's ruling on a motion for summary disposition. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other

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> relating to this insurance or to a loss to which this insurance applies.

[3] On November 25, 2013, before the judgment, defendant had filed an application for leave to appeal. The leave application was dismissed following defendant's motion to withdraw the appeal. See *Walega v Walega*, unpublished order of the Court of Appeals, entered May 20, 2014 (Docket No. 319233).

> evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (citations omitted)].

We also review de novo questions of law, including statutory interpretation. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

> The primary goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language." "The first step in that determination is to review the language of the statute itself." Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he words of a statute provide 'the most reliable evidence of its intent . . . .' " [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (citations omitted; alteration in original).]

In addition, as noted in *Churchman v Rickerson*, 240 Mich App 223, 228-229; 611 NW2d 333 (2000):

> The no-fault act generally is to be construed liberally because it is remedial in nature. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). However, this rule of construction is intended to apply to the payment of benefits to injured parties, who were intended to benefit from the adoption of no-fault legislation. *Id*. Where appropriate, the act should be broadly construed to effectuate coverage. *McMullen v Motors Ins Corp*, 203 Mich App 102, 107; 512 NW2d 38 (1993).

MCL 500.3105(1) provides: "Under personal protection insurance an insurer is liable to pay benefits for

accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." Analyzing the use of the phrase "as a motor vehicle" in MCL 500.3105(1), our Supreme Court stated:

> As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle' " would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes. [*McKenzie*, 458 Mich at 218-219.]

The *McKenzie* Court went on to state that under the Motor Vehicle Code, " '[v]ehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway . . . ." *Id*. at 219, quoting MCL 257.79 (some quotation marks omitted). In addition to the statutory definition of "vehicle," the *McKenzie* Court also noted that "the dictionary definition of 'vehicle' is 'any device or contrivance for carrying or conveying persons or objects, esp. over land or in

space . . . .' " *McKenzie*, 458 Mich at 219, quoting *Webster's New World Dictionary* (3d College Ed). Based on these definitions, the Court held "that the clear meaning of this part of the no-fault act is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *McKenzie*, 458 Mich at 220. Applying the transportational function test, the *McKenzie* Court held that the insured in that case was not entitled to PIP benefits for injuries that resulted while using the vehicle as sleeping accommodations because such use was "too far removed from the transportational function to constitute use of the camper/trailer 'as a motor vehicle' at the time of the injury." *Id*. at 226.

In the instant case, viewing the facts in the light most favorable to defendant, it is undisputed that the insured truck was being driven for purposes of moving the safe. As noted in *McKenzie*, 458 Mich at 221, "moving motor vehicles are quite obviously engaged in a transportational function." While defendant attempts to limit the importance of this statement, it is clear that in the case at bar, the truck was moving for the purpose of transporting or conveying the safe from one location to another when the injury occurred. Thus, "the requisite nexus between the injury and the transportational function of the motor vehicle" is present. *Id*. at 226.

Defendant relies on *Morosini v Citizens Ins Co of America (After Remand)*, 461 Mich 303, 310; 602 NW2d 828 (1999), which states that "[c]overage is not mandated by the fact that the injury occurred within a moving vehicle" and that "[i]ncidental involvement of a motor vehicle does not give rise to coverage . . . ." However, defendant fails to note that *Morosini* made

such statements based on the holdings of *Thornton v Allstate Inc Co*, 425 Mich 643; 391 NW2d 320 (1986), *Marzonie v ACIA*, 441 Mich 522; 495 NW2d 788 (1992), and *Bourne v Farmers Ins Exch*, 449 Mich 193; 534 NW2d 491 (1995). Each of those cases dealt with a situation in which the driver of the vehicle was injured after being assaulted by a third party. None of the drivers were injured as a result of a motor vehicle accident. *Morosini*, 461 Mich at 307-309, citing *Thornton*, 425 Mich at 660; *Marzonie*, 441 Mich at 534; and *Bourne*, 449 Mich at 203. Indeed, *Morosini* itself involved a claim for PIP benefits not as the result of injuries that occurred in a car accident, but rather as the result of injuries sustained when the plaintiff was assaulted by the driver who rear-ended him. *Morosini*, 461 Mich at 305. Clearly, *Morosini*, and the cases relied on therein (*Thornton*, *Marzonie*, and *Bourne*), are distinguishable from the instant case.[4]

Defendant also attempts to argue that this case is akin to *Gooden v Transamerica Ins Corp of America*, 166 Mich App 793; 420 NW2d 877 (1988). However, in that case, the plaintiff was using his parked truck to "ensure greater stability and to extend the ladder's reach" as the plaintiff was "chipping ice off the roof of a friend's home." *Id*. at 795. In other words, the plaintiff was simply using the truck to stabilize and extend the ladder's height; according to the Court, the

[4] In *McKenzie*, this Court stated that the analysis used in *Thornton*, in which the Michigan Supreme Court focused on "whether the alleged injury was causally related to the 'vehicular use,' 'functional character,' or 'functional use' of a motor vehicle," supported the transportational function approach. *McKenzie*, 458 Mich at 222-223, quoting *Thornton*, 425 Mich at 660-661. The *McKenzie* Court stated that its approach, "focusing on the transportational function, makes the same distinction and provides a more specific definition for these terms." *McKenzie*, 458 Mich at 223.

truck "was nothing more than a scaffold." *Id*. at 805-806. He was not using the truck to transport anything.

Defendant also relies on *Winter v Auto Club of Mich*, 433 Mich 446; 446 NW2d 132 (1989). However, that case dealt with exceptions to the parked vehicle exclusion, *id*. at 455, and, as noted in *McKenzie*, was consistent with the Court's approach in *McKenzie*, because the "injury [in *Winter*] arose out of the use of a motor vehicle as a foundation for construction equipment and was not closely associated with the transportational function." *McKenzie*, 458 Mich at 221.[5]

We agree with plaintiff that this case is similar to *Smith*, 114 Mich App 431, a case decided before November 1, 1990.[6] The *Smith* plaintiff "was injured while riding on an inner tube which was being towed by the insured vehicle." *Id*. at 432. In finding that the plaintiff was entitled to PIP benefits, this Court stated:

> [T]he motor vehicle itself was the instrumentality of the plaintiff's injury. At the time of the accident the vehicle was being driven down a public roadway which is a use which is certainly consistent with its inherent nature and in accordance with its intended purpose. It was being used, therefore, as a motor vehicle and as a motor vehicle would normally be used. The fact that it may not have been contemplated, as the defendant argues, that the operator of a motor vehicle would pull someone in an inner tube over a snow-covered road, or the fact that it may have been negligent or even illegal to do so, is no defense to coverage under the provisions of the no-fault act. The act is certainly intended to compensate for injuries sustained

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[5] Defendant further attempts to rely on several unpublished opinions to support its position that the truck in this case was not being used "as a motor vehicle" at the time it was being used to move the safe. These cases are not precedentially binding on this Court, see MCR 7.215(C)(1), and they are distinguishable from the instant case.

[6] See MCR 7.215 (J)(1).

> as the direct result of negligent or unexpected use of a motor vehicle so long as the vehicle is being used "as a motor vehicle".
>
> To be entitled to PIP benefits a claimant must establish a causal connection, which is more than fortuitous, incidental or but for, between the use of the motor vehicle and the injury sustained. *DAIIE v Higginbotham* [95 Mich App 213; 290 NW2d 414 (1980)]. We find that such a causal connection is established under the facts of this case. An injury which directly results from the force of a motor vehicle which is being driven down a roadway in the normal manner is an injury which arises "out of the * * * operation * * * or use of a motor vehicle as a motor vehicle * * *." [*Smith*, 114 Mich App at 434-435.]

Similarly, in this case, plaintiff's injury resulted from the force of the motor vehicle hitting uneven concrete causing the safe to fall over and onto plaintiff's leg. Whether the safe was on the bed of the truck, or being pulled by a rope from the back of the truck, at the time the safe fell over, the truck "was the instrumentality of plaintiff's injury." *Smith*, 114 Mich App at 434. Driving a truck to transport an item is "consistent with [a truck's] inherent nature and in accordance with its intended purpose." *Id*. Although the particular method used to transport the safe, i.e., dragging it, may not have been contemplated, the use of a truck to transport an item is a normal use. Thus, the injury occurred while the truck was being used as a motor vehicle. *Id*.[7]

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[7] Defendant's attempt to distinguish *Smith* on the basis that the truck in *Smith* was being driven down a public roadway, as opposed to down a driveway, is unpersuasive. Defendant has not provided any caselaw, and we have not located any, suggesting that an injury that occurred on a driveway, as opposed to a roadway, is any less cognizable under the no-fault act. Rather, "as § 3106 indicates, a vehicle need not be moving at the time of an injury for the injury to arise out of the use of a motor vehicle as a motor vehicle, i.e., out of its transportational function." *McKenzie*, 458 Mich at 219 n 6.

Finally, in *Drake v Citizens Ins Co of America*, 270 Mich App 22, 24; 715 NW2d 387 (2006), the plaintiff was injured while "assisting [the delivery truck driver] in unclogging the truck's auger system" as the driver attempted to unload animal feed. In holding that the plaintiff was entitled to PIP benefits, this Court specifically stated that the situation in *Drake* was "unlike those circumstances identified in *McKenzie* as rare instances 'when a motor vehicle is used for other purposes . . . .' " *Drake*, 270 Mich App at 26, quoting *McKenzie*, 458 Mich at 219. This Court noted that the vehicle involved in *Drake* was "a delivery truck, and it was being used as such when the injury occurred." *Drake*, 270 Mich at 26. Accordingly, this Court held that the plaintiff's injury was "closely related to the motor vehicle's *transportational function*, and therefore arose out of the operation, ownership, maintenance, or use of a motor vehicle 'as a motor vehicle.' " *Id*., citing *McKenzie*, 458 Mich at 220.

In the present case, plaintiff was using a truck to move or transport a very heavy safe, at a minimum, from his garage to his driveway. It is normal and foreseeable to use a truck, fitted with a trailer hitch, to move heavy objects. Accordingly, plaintiff's injury was closely related to the transportational function of the vehicle, and therefore, the injury arose out of the operation, ownership, maintenance, or use of a motor vehicle "as a motor vehicle." For the above reasons, we hold that the trial court did not err when it held that plaintiff was entitled to PIP benefits.

Affirmed. As the prevailing party, plaintiff may tax costs under MCR 7.219.

TALBOT, P.J., and FORT HOOD, J., concurred with WILDER, J.

HILLENBRAND v CHRIST LUTHERAN CHURCH OF BIRCH RUN

Docket No. 319127. Submitted March 11, 2015, at Lansing. Decided September 15, 2015, at 9:00 a.m.

Richard P. Hillenbrand brought an action seeking declaratory and injunctive relief in the Saginaw Circuit Court, alleging that Christ Lutheran Church of Birch Run had wrongfully terminated his employment as a pastor in violation of the constitution and bylaws of the Lutheran Church—Missouri Synod (LCMS), of which defendant was a member. Plaintiff initially sought relief through the dispute resolution process set forth in the LCMS's bylaws, but before a hearing could be held, defendant withdrew its membership from the LCMS and declined to participate. Nevertheless, an LCMS dispute resolution panel determined that it had the authority to act in the matter and ruled that defendant's decision to terminate plaintiff's employment should be reviewed and revised, and further ruled that plaintiff was entitled to compensation from defendant. After plaintiff brought this court action seeking to be restored to his position, defendant moved for summary disposition, arguing that the ecclesiastical abstention doctrine prevented a court from determining whether a church had violated its own policies and procedures. The court, Frederick L. Borchard, J., granted defendant's motion under MCR 2.116(C)(4), ruling that because the relationship between defendant and the LCMS was congregational rather than hierarchical in nature, the court lacked subject-matter jurisdiction over the action. The court denied plaintiff's motion for reconsideration, and plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting defendant's motion for summary disposition. Under the ecclesiastical abstention doctrine, if the facts indicate that a denomination is hierarchical, a civil court may not redetermine the correctness of an interpretation of canonical text or some decision relating to the government of the religious polity, but must defer to the resolution of those issues by the highest court of a hierarchical church organization. When a denomination is determined to be hierarchical, trial courts have jurisdiction to enter a judgment, but the judgment must resolve the matter consistent with any determinations already made by

the denomination. Determining whether a denomination is hierarchical is a factual question. A church organization is congregational if it is self-governing and hierarchical if it is part of and governed by a larger organization. A plain reading of LCMS's constitution indicated that the LCMS was only an advisory body and not a governing body. Therefore, the court did not clearly err by determining that LCMS was congregational in nature. Further, LCMS's constitution provided that it controlled and superseded bylaws and all other rules and regulations, including a 1983 resolution indicating that the LCMS had hierarchical dimensions, and that LCMS's resolutions were not binding on individual congregations if the individual congregations deemed them inexpedient. This statement clearly left individual congregations open to adopt or disregard LCMS's resolutions. Because the plain language of LCMS's constitution expressly indicated that it was not a governing body, the court was not required to accept the interpretation provided by the denomination.

2. The trial court erred by finding that defendant could withdraw from the LCMS because LCMS's bylaws prohibited its members from terminating their membership in a manner that would render a decision of the dispute resolution panel inapplicable. Defendant informed the LCMS that it was withdrawing its membership because of the politics involved with the Michigan District of the Missouri Synod and because it wanted a pastor who cared about them, and further informed the LCMS that it would not be attending and did not agree to be bound by any dispute resolution hearing conducted by the LCMS. Because defendant was not permitted to render the dispute resolution hearing inapplicable in that manner, its doing so was improper. However, the trial court did not err by concluding that any decision from the dispute resolution panel would have been advisory and not binding on the parties.

Affirmed.

Davis Burket Savage Listman Brennan (by *Robert C. Davis* and *William N. Listman*) for plaintiff.

Johnston, Sztykiel & Hunt, PC (by *J. Steven Johnston* and *Joseph N. Fraser*), for defendant.

Amicus Curiae:

Thompson Coburn LLP (by *Todd A. Rowden*) for the Lutheran Church—Missouri Synod.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

STEPHENS, J. Plaintiff appeals as of right the opinion and order of the trial court granting defendant's motion for summary disposition under MCR 2.116(C)(4). We affirm.

I. BACKGROUND

Defendant is a Lutheran church. Plaintiff served as pastor at defendant church for seven years, from 2005 until his employment was terminated in 2012. In 2013, plaintiff filed a complaint against defendant that alleged defendant, as a member of the Lutheran Church—Missouri Synod (LCMS), wrongfully terminated plaintiff's employment in violation of LCMS's constitution. Plaintiff requested that the trial court enjoin defendant's termination of plaintiff as its pastor, order defendant to reinstate plaintiff as its pastor, order defendant to remove any reference to defendant's termination of plaintiff as its pastor, and order the restoration of plaintiff's rights under his employment agreement with defendant.

According to plaintiff, LCMS's constitution required the employment dispute to be presented to an LCMS Dispute Resolution Panel. A hearing was held before such a panel on August 17, 2012, and August 18, 2012, but defendant had withdrawn its membership from LCMS on June 18, 2012, and stated that it would not participate in the hearing. The panel ruled that defendant's decision to terminate plaintiff's employment as its pastor "should be reviewed and revised." The panel further concluded that plaintiff was entitled to compensation from the date that defendant terminated plaintiff's employment as its pastor, March 11, 2012, "until said time when [plaintiff] receives and, if he so

chooses, as led by the Holy Spirit, to accept a call to another congregation," in the amount of $59,800 as an annual salary, as well as $12,500 for additional out-of-pocket expenses related to health insurance, retirement benefits, and costs related to the hearing.

In lieu of filing an answer to plaintiff's complaint, defendant filed a motion for summary disposition under MCR 2.108(B), MCR 2.116(C)(4), and MCR 2.116(C)(7). Defendant asserted that it was entitled to summary disposition because the ecclesiastical abstention doctrine prevented a court from determining whether a church had violated its own policies and procedures. Defendant also argued that it was entitled to summary disposition because, under the common law governing arbitration, its agreement to be bound by a hearing before an LCMS panel was unilaterally revocable. Plaintiff filed a response to defendant's motion, arguing that because LCMS was hierarchical, as opposed to congregational, the hearing before the panel was binding and should therefore be enforced.

After a hearing, the trial court issued a written opinion and order granting defendant's motion for summary disposition. The trial court found that LCMS was congregational and not hierarchical. The trial court found that the plain language of LCMS's 1983 resolution created a hierarchical relationship only as to the "initial call to become a pastor and not for the decision to terminate a call." The trial court further ruled that even if the 1983 resolution language applied to a pastor's termination, the only remedy available would be to revoke defendant's membership in LCMS. Lastly, the trial court ruled that LCMS did not have authority to bind defendant during the hearing because defendant was no longer an LCMS member and

had withdrawn its consent before the hearing. Plaintiff's motion for reconsideration was denied.

This appeal followed. LCMS was granted leave to file a brief amicus curiae.[1]

II. SUMMARY DISPOSITION

Plaintiff maintains that the trial court's grant of summary disposition to defendant was erroneous because LCMS is a hierarchical organization. We disagree.

"[This Court] review[s] the trial court's grant or denial of summary disposition de novo." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999). A trial court's interpretation of an organization's constitution and bylaws is also reviewed de novo. See *Slatterly v Madiol*, 257 Mich App 242, 250-251, 256; 668 NW2d 154 (2003). The Court reviews a trial court's findings of fact for clear error. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). "A trial court's factual findings are clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (citation and quotation marks omitted).

Summary disposition is appropriate under MCR 2.116(C)(4) when a court lacks jurisdiction over the subject matter of an action. When reviewing such a motion, this Court "must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue

[1] *Hillenbrand v Christ Lutheran Church of Birch Run*, unpublished order of the Court of Appeals, entered May 28, 2014 (Docket No. 319127).

of material fact." *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998).

"[T]he First and Fourteenth Amendments to the United States Constitution protect freedom of religion by forbidding governmental establishment of religion and by prohibiting governmental interference with the free exercise of religion." *Bennison v Sharp*, 121 Mich App 705, 712; 329 NW2d 466 (1982). "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, 565 US 171, 181; 132 S Ct 694; 181 L Ed 2d 650 (2012). The United States Supreme Court has confirmed "that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Id*. at 185.

Under the ecclesiastical abstention doctrine, "where the facts indicate that a denomination is hierarchical, 'civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to the government of the religious polity,' . . . but must defer to the resolution of those issues 'by the highest court of a hierarchical church organization[.]' " *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602, 616; 777 NW2d 15 (2009), quoting *Smith v Calvary Christian Church*, 462 Mich 679, 684; 614 NW2d 590 (2000); see also *Bennison*, 121 Mich App at 713. "[W]hen a denomination is determined to be hierarchical, trial courts have jurisdiction to enter a judgment, but the judgment must resolve the matter consistent with any determinations already made by the denomination." *Id*.

"The determination of whether a denomination is hierarchical is a factual question." *Id*. at 615, citing

Calvary Presbyterian Church v Presbytery of Lake Huron of the United Presbyterian Church, 148 Mich App 105, 113; 384 NW2d 92 (1986). A denomination is hierarchical if it "is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control . . . ." *Bennison*, 121 Mich App at 720. "A denomination is organized in a hierarchical structure when it has a central governing body which has regularly acted within its powers while the looser 'congregational' structure generally has all governing powers and property ownership remaining in the individual churches." *Lamont*, 285 Mich App at 618 (citation, brackets, and quotation marks omitted). Stated differently, a church organization is congregational if it is self-governing; a church organization is hierarchical if it is "part of *and governed by* a larger organization." *Little v First Baptist Church, Crestwood*, 475 US 1148, 1148; 106 S Ct 1802; 90 L Ed 2d 347 (1986) (Marshall, J., dissenting) (emphasis added).

The trial court found that it lacked jurisdiction over the subject matter of this lawsuit under MCR 2.116(C)(4) because LCMS was congregational. Our review of the trial court's grant of summary disposition, therefore, begins with an examination of whether LCMS is hierarchical or congregational.

According to defendant's articles of association, its members "shall worship and labor together according to the discipline, rules and usage of [LCMS] in the United States of America as from time to time authorized and declared by the delegate convention."

Article VII of LCMS's constitution, entitled "Relation of the Synod to Its Members," states as follows:

> 1. In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive

> powers, and with respect to the individual congregation's right of self-government it is but an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned.
>
> 2. Membership of a congregation in the Synod gives the Synod no equity in the property of the congregation.

Article XIII, "Expulsion from the Synod," ¶ 1, provides that "[m]embers who act contrary to the confession laid down in Article II and to the conditions of membership laid down in Article VI or persist in an offensive conduct shall, after previous futile admonition, be expelled from the Synod." Article XIV grants LCMS the right to "adopt bylaws that are consistent with and do not contradict the Constitution of the Synod, which controls and supersedes such bylaws and all other rules and regulations of the Synod."

Under § 1.10.1.1 of LCMS's bylaws, "[t]he use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute." Section 1.10.2 states, in part, as follows regarding the conflict resolution procedures:

> It shall be the exclusive remedy to resolve such disputes that involve theological, doctrinal, or ecclesiastical issues except those covered under Bylaw sections 2.14-2.17 and except as provided in Bylaw 1.10.3. It is applicable whether the dispute involves only a difference of opinion without personal animosity or is one that involves ill will and sin that requires repentance and forgiveness. No person or agency to whom or to which the provisions of this dispute resolution process are applicable because such person or agency is a member of the Synod may render these provisions inapplicable by terminating that membership.

Section 1.10.3, however, indicates that "[t]his chapter provides evangelical procedures to remedy disputes only and does not set forth procedures for expulsion from membership[.]" It also indicates that "[w]hile Christians are encouraged to seek to resolve all their disputes without resorting to secular courts, this chapter does not provide an exclusive remedy for . . . [d]isputes arising under contractual arrangements of all kinds[.]" Under § 1.10.7.4, ¶ (d), the final decision of a dispute resolution hearing panel is "binding upon the parties."

LCMS's 1983 resolution, entitled "To Reaffirm Essential Congregational Polity of the Synod," states that "[t]he word 'hierarchical' is repugnant to Missouri Synod Lutherans because etymologically it refers to 'rule by the priesthood' " and is defined differently by civil courts than it is in theology. The resolution further states that "[i]n past instances the Synod has utilized the legal nomenclature 'hierarchical' in legal proceedings in order to preserve to member congregations and others who associate together within the Synod the right to resolve disputes freely in accordance with established synodical procedures[.]"

The LCMS resolution then states as follows:

> *Resolved*, That The Lutheran Church—Missouri Synod reaffirms that its synodical polity is essentially and principally congregational in nature and therefore is ordinarily referred to as a congregational polity; and be it further
>
> *Resolved*, That the Synod acknowledges that under the definition and application of the word "hierarchical" in civil law there are aspects in the relationships within the Synod between and among congregations (e.g. Article II, Confession; the calling of certified and endorsed pastors only; agreements to abide by adjudicatory procedures and their final determinations) which under civil law may

> imply, express, or evidence what the courts regard as hierarchical dimensions; and be it further
>
> *Resolved*, That, believing that Scripture (1 Cor. 6) requires that we make every effort to avoid disputes or to resolve them internally when they do arise, of the two constitutional methods for resolving church disputes by the civil courts, the Synod favors the "neutral principles of law" method whenever it can be applied, and that when neutral principles cannot be applied to resolve a particular controversy, the Synod declares that it is able and willing to resolve disputes internally; and be it further
>
> *Resolved*, That while we believe the courts should recognize that there are church polities other than "congregational" and "hierarchical," unless and until courts do so, the present status of case law compels us to use certain legal terminology; and be it finally
>
> *Resolved*, That with the previously outlined explanation, the Synod declares itself as satisfied with the procedures heretofore followed by the Synod in instances involving these issues.

Although its resolution and bylaws both apparently attempt to create an "exclusive," "final," and "binding" dispute resolution process, LCMS's constitution unequivocally states that it "is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body." LCMS has made it clear through its constitution, bylaws, and resolution that individual congregations, including defendant, are self-governing. There is no question that at the time plaintiff was removed as defendant's pastor, defendant was "part of" LCMS; however, LCMS's constitution, its controlling document, expressly indicates that defendant is not "governed by" LCMS. See *Little*, 475 US at 1148 (Marshall, J., dissenting). Under this plain reading of LCMS's constitution, LCMS "is

but an advisory body" and not a governing body. Therefore, LCMS is congregational in nature.

Plaintiff and LCMS ask this Court to find LCMS to be a hybrid entity: generally congregational, but hierarchical in nature regarding confession, ministerial call, and its dispute resolution process. We decline to do so. We conclude that we are bound by LCMS's unequivocal statement in its constitution that it "is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body." LCMS's constitution provides that it "controls and supersedes such bylaws and all other rules and regulations of the Synod." Therefore, even if the resolution indicates that LCMS has hierarchical dimensions, such an indication is in direct conflict with and superseded by the constitution's statement that LCMS does not affect an individual congregation's right of self-government.

LCMS's contention that its resolution is consistent with its constitution rests on the conclusory statement that its "Commission on Constitutional Matters" decided that it was. In short, LCMS's own determination is not binding on this Court if this Court " 'could enforce [the documents] without engaging in a searching and therefore impermissible inquiry into church polity . . . .' " *Lamont*, 285 Mich App at 617 (citation omitted).

Further, LCMS's constitution declares that "no resolution of the Synod imposing anything upon the individual congregation is of binding force . . . if it appears to be inexpedient as far as the condition of a congregation is concerned." Stated differently, LCMS's resolutions are not binding on individual congregations if the individual congregations deem them "inexpedient."

This statement clearly leaves individual congregations open to adopt or disregard LCMS's resolutions based on that congregation's "condition." Interpreting this as advisory, rather than binding, is consistent with LMCS's self-imposed "advisory body" label.

Contrary to the assertions of plaintiff and LCMS, the trial court refrained from delving into the polity of the church. Courts are permitted to enforce a denomination's constitutional provisions only if those constitutional provisions are expressed in a way that would not require courts to make an impermissible inquiry into church polity. *Lamont*, 285 Mich App at 617. When examining religious documents, "a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts . . . ." *Jones v Wolf*, 443 US 595, 604; 99 S Ct 3020; 61 L Ed 2d 775 (1979). Here, the plain language of LCMS's constitution expressly indicates that LCMS is not a governing body. It is for this reason that our Court need not "accept the interpretation provided by the denomination . . . ." *Lamont*, 285 Mich App at 617. We have merely applied the general principles of contract law to this situation. See, e.g., *Slatterly*, 257 Mich App at 255-256 ("Bylaws are generally construed in accordance with the same rules used for statutory construction. Thus, we must first look at the specific language of the bylaw. If the language is unambiguous, the drafters are presumed to have intended the meaning plainly expressed.").

It is worth noting, however, that Article VIII ("Separation") of defendant's revised constitution states as follows:

> If, at any time, a separation shall take place on account of doctrines, the property of the congregation and all benefits therewith connected shall remain with those

> communicant members who continue to adhere in confession and practice of Article III of this constitution. In event of any disagreement that may lead to possible separation, the final decision relative to Article III shall rest with the Board of Appeals of the Lutheran Church-Missouri Synod. In the event the congregation shall totally disband, the property and all rights connected therewith shall be transferred to the Michigan District of the Lutheran Church-Missouri Synod.

However, Article X ("Synodical Membership"), again in the revised constitution, specifically states the following:

> This congregation shall be affiliated with the Lutheran Church-Missouri Synod as long as the confessions and constitution of said Synod are in accord with the confession and constitution of this congregation as laid down in Article III.
>
> This congregation shall, to the best of its ability, collaborate with said Synod and assist it in effecting all sound measures intended for the building up of the Kingdom of God.

When considering Article XIII in relation to the document as a whole, it seems apparent that defendant "affiliated" itself with LCMS, but did not subordinate itself in a hierarchical relationship. See *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 24; 818 NW2d 337 (2011) ("Every provision of the constitution must be interpreted in light of the document as a whole, and no provision should be construed to nullify or impair another.").

Plaintiff relies heavily on *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*. In that case, a Michigan Lutheran church and school, which was also a member of LCMS, terminated a "called" teacher's employment after she began suffering from and was diagnosed with narcolepsy and missed approximately seven

months of teaching. *Hosanna-Tabor*, 565 US at 178-179. The reasons given for her termination were insubordination, disruptive behavior, damage to her working relationship with the church and school, and threatening to take legal action. *Id*. at 179. The teacher filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that her employment was terminated in violation of the Americans with Disabilities Act, 43 USC 12101 *et seq*. *Id*. The EEOC and the teacher sued the church and school, requesting that she be reinstated to her former position. *Id* at 180.

The issue before the United States Supreme Court was whether the teacher was a minister, which would entitle the church and school to protection under the "ministerial exception" of the Civil Rights Act, 42 USC 2000e *et seq*., and other employment discrimination laws. *Id*. The Court found that she was; therefore, the Court concluded, "the First Amendment requires dismissal of this employment discrimination suit against her religious employer." *Id*. at 194. The Court explained that whether it reinstated the teacher to her previous position or ordered compensatory and punitive damages, "[s]uch relief would depend on a determination that Hosanna-Tabor was wrong to have relieved [the teacher] of her position, and it is precisely such a ruling that is barred by the ministerial exception." *Id*. The Supreme Court explained that "[b]y requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers." *Id*. Plaintiff contends that *Hosanna-Tabor* directly controls the outcome of this case in his favor.

In *Hosanna-Tabor*, the Supreme Court was faced with determining whether a religious organization's freedom to select its ministers was implicated by an employment discrimination suit, which the Court held that it was. *Id* at ___. In the instant case, however, plaintiff is asking this Court to do exactly what the United States Supreme Court said courts should not, i.e., impose an unwanted minister on a church:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. [*Id*. at 188-189.]

The United States Supreme Court, citing *Serbian Eastern Orthodox Diocese for the United States of America & Canada v Milivojevich*, 426 US 696; 96 S Ct 2372; 49 L Ed 2d 151 (1976), expressly refused to determine whether the church, not LCMS or the employee, followed the required procedures in terminating the teacher's employment. *Hosanna-Tabor*, 565 US at 187. The Court made no reference to LCMS's position on whether the teacher's employment was properly terminated. In the instant case, plaintiff is asking this Court to determine that defendant failed to follow the proper procedures in terminating his employment, and to reinstate him through that process based on

LCMS's position. This would involve analyzing the church's decision to terminate plaintiff's employment as its pastor in the exact manner that *Hosanna-Tabor* forbids.

While acknowledging that this is a complicated question, we conclude that the trial court did not err by concluding that LCMS is congregational in nature and, therefore, properly granted summary disposition to defendant.

III. THE EFFECT OF THE DECISION OF THE DISPUTE RESOLUTION PANEL

Plaintiff also argues that the trial court erred by finding that defendant could withdraw from the Synod because defendant's withdrawal nullified the ruling of the decision of the dispute resolution panel. Because LCMS's bylaws prohibit its members from terminating their membership in a manner that renders a decision of the dispute resolution panel inapplicable, we agree.

This Court reviews a trial court's interpretation of an organization's bylaws de novo. See *Slatterly*, 257 Mich App at 250. Review of a trial court's findings of fact is for clear error. *Ambassador Bridge Co*, 481 Mich at 35. "A trial court's factual findings are clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (citation and quotation marks omitted).

As discussed, bylaw drafters are presumed to have intended the meaning plainly expressed if the language at issue is unambiguous. *Slatterly*, 257 Mich App at 255-256. This Court "presume[s] that every word has a meaning and should avoid any construction that would render any part of a bylaw nugatory." *Id*. at 256.

Section 1.10.2 of LCMS's bylaws states the following: "No person or agency to whom or to which the provisions of this dispute resolution process are applicable because such person or agency is a member of the Synod may render these provisions inapplicable by terminating that membership." In a letter dated June 18, 2012, defendant informed LCMS that it was withdrawing its membership effective that day "due to the politics involved with the Missouri Synod" and because it wanted "a pastor that cares about them." In a letter dated August 8, 2012, defendant informed LCMS that it would not be attending and was not agreeing to be bound by any dispute resolution hearing conducted by LCMS.

The plain language of § 1.10.2 clearly indicates that an LCMS member cannot terminate its membership in a way that renders the dispute resolution hearing process inapplicable. Here, two months before the dispute resolution hearing was scheduled to take place, defendant terminated its membership and refused to attend the dispute resolution hearing. The contents of the June 18 letter appear to refer to the issue of plaintiff's employment. As defendant was not permitted to render the dispute resolution hearing inapplicable in that manner under § 1.10.2, its doing so was improper. Therefore, the trial court erred by making any finding that permitted defendant to do so.

Nevertheless, any decision from the dispute resolution panel would have been advisory and not binding on the parties as plaintiff argues. LCMS is "but an advisory body" and is not a legislative or coercive body that affects its individual congregations' right to self-government. Any recommendations it—or its individual committees, including its dispute resolution panel—makes are merely advisory under its constitution, and

each congregation may or may not choose to follow them. The panel's own wording further indicates that its decision was advisory and not binding. In concluding whether the panel had authority to act in this matter, it stated "that it does have authority to act in this matter to either uphold the action of the congregation in removing [plaintiff], or *advise* the congregation to review and revise its decision." (Emphasis added.) Then, in determining whether defendant "should . . . be *advised* to review and revise its decision," the dispute resolution panel concluded that defendant's decision "*should* be reviewed and revised." (Emphasis added.) Lastly, in determining what "restitution" was owed from defendant to plaintiff, the panel concluded by stating, in part, as follows: "While it is beyond the purview and scope of this Panel to determine every such damage, we did conclude that, on the basis of the documentary evidence, we could *advise* to an amount of restitution . . . ." (Emphasis added.) The record supports the trial court's finding that the panel's decision was merely advisory. The very most that the panel's decision would have done was to require defendant to "revisit and revise" its decision to remove plaintiff as its pastor. It follows that defendant would still be permitted to choose not to abide by the panel's advice.

Because LCMS's constitution and bylaws, as well as the hearing panel's decision itself, are expressly advisory in nature, the trial court did not err by concluding that the dispute resolution panel's decision was advisory.

Affirmed.

WILDER, P.J., and SERVITTO, J., concurred with STEPHENS, J.

TITAN INSURANCE COMPANY v AMERICAN COUNTRY INSURANCE COMPANY

BRONSON METHODIST HOSPITAL v TITAN INSURANCE COMPANY

Docket Nos. 319342 and 321598. Submitted August 5, 2015, at Lansing. Decided September 15, 2015, at 9:05 a.m. Leave to appeal denied 499 Mich 944.

In Docket No. 319342, Titan Insurance Company brought an action in the Wayne Circuit Court against American Country Insurance Company following a motor vehicle accident involving an uninsured vehicle. Stanley Hughes was injured while operating an uninsured van owned by Safe Arrival Transportation, which was in the business of transporting passengers. Hughes did not have a personal no-fault policy. Hughes's claim was assigned to Titan. Titan filed suit asserting that American Country, which insured a different vehicle owned by Safe Arrival, was a higher priority insurer. The parties filed cross-motions for summary disposition. The court, Lita M. Popke, J., granted summary disposition in favor of American Country. Titan appealed.

In Docket No. 321598, Bronson Methodist Hospital brought an action in the 8th District Court, Robert C. Kropf, J., against Titan and American Country following a motor vehicle accident involving an uninsured vehicle. George Slack was injured while operating an uninsured van owned by Bronco Express Company, a taxi service. Slack did not have a personal no-fault policy. Slack was treated at Bronson, which sought reimbursement. The claim was assigned to Titan, but Titan asserted that American Country was responsible for the claim because American Country insured other vehicles owned by Bronco Express. Titan filed a cross-claim against American Country in Bronson's suit. American Country moved for summary disposition. The court held that American Country was responsible for the claim. American Country appealed in the Kalamazoo Circuit Court, Alexander C. Lipsey, J., which affirmed the district court's ruling. American Country sought leave to appeal. The Court of Appeals granted leave in Docket No. 321598 and consolidated the appeal in that case with the appeal in Docket No. 319342.

The Court of Appeals *held*:

Under MCL 500.3114(1), a person must generally seek personal protection insurance (PIP) benefits from his or her own insurer, but the exceptions set forth in MCL 500.3114(2), (3), and (5) supersede the general rule. Under MCL 500.3172, if no insurance is available, a person may obtain benefits through the Assigned Claims Plan. MCL 500.3114(2) states that a person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. In these cases, if the vehicles at issue had been properly insured, Subsection (2) would have applied. Caselaw indicates that in cases such as those at issue here, in which an exception to MCL 500.3114(1) should apply but insurance is not available, the general rule of Subsection (1) applies. Caselaw further demonstrates that in cases in which Subsection (1) applies, but a personal no-fault insurer is not available, as was the case here because neither Hughes nor Slack had no-fault insurance, Subsection (4) applies. Subsection (4) states that except as provided in Subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim PIP benefits from insurers in the following order of priority: (a) the insurer of the owner or registrant of the vehicle occupied, and then, (b) the insurer of the operator of the vehicle occupied. Taken together, Subsections (1) and (4) establish the general order of priority. That is, the language "[e]xcept as provided in subsections (1) to (3)" at the beginning of Subsection (4) means "if insurance is not available under Subsections (1) to (3)." In the cases on appeal, under Subsection (4)(a), because American Country insured other vehicles owned by Safe Arrival and Bronco Express, it was responsible for the claims at issue.

Circuit court judgment in Docket No. 319342 reversed, and circuit court judgment in Docket No. 321598 affirmed. Docket No. 319342 remanded for further proceedings.

GLEICHER, J., concurring, agreed with the majority that under controlling caselaw American Country stood in higher priority than Titan, but wrote separately to suggest that the text of MCL 500.3114 merited renewed consideration by the Supreme Court, and stated that if she were writing on a clean slate, she would hold the priority rules set forth in the statute ambiguous when applied to PIP claims arising from commercial vehicle accidents. MCL 500.3114(2) plainly provides, with carefully delineated exceptions, that when a vehicle used in the commercial transpor-

tation of customers is involved in an injury-producing accident, the insurer of the commercial vehicle provides PIP coverage. The Legislature omitted from this subsection any priority fall-back rules. The Legislature's omission of an alternative priority scheme in the subsection specifically addressing vehicles operated in the business of transporting passengers could mean that the Legislature did not intend to place responsibility on a specific insurer that had not undertaken the risk of insuring the commercial vehicle, but rather that when there was no coverage for the vehicle that coverage would automatically default to the Assigned Claims Plan. Alternatively, and as the lead opinion held, Subsection (4) serves as the priority road-map for vehicles operated in the business of transporting passengers, even though such vehicles are not mentioned in that subsection. A footnote in *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191 (1986), supports the conclusion reached in the lead opinion. Application of that rule in these cases means that American Country is responsible for the PIP claims at issue, despite the fact that American Country never agreed to insure the commercial vehicles involved in the accidents. Perhaps this is what the Legislature intended. But given the plain language of Subsections (2) and (4), it is plausible that the Legislature envisioned that if a commercial transportation service owner failed to obtain PIP coverage for some vehicles in his or her fleet, the risk would be spread to all insurers subject to assigned claims obligations through the Assigned Claims Plan. This ambiguity warrants further consideration by the Michigan Supreme Court.

INSURANCE — NO-FAULT — PRIORITY.

Under MCL 500.3114(1), a person must generally seek personal protection insurance (PIP) benefits from his or her own insurer, but the exceptions set forth in MCL 500.3114(2), (3), and (5) supersede the general rule; when an exception to MCL 500.3114(1) should apply but insurance is not available in accordance with that exception, the general rule of Subsection (1) applies; when Subsection (1) applies, but a personal no-fault insurer is not available, Subsection (4) applies; under Subsection (4), if insurance is not available under Subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim PIP benefits from insurers in the following order of priority: (a) the insurer of the owner or registrant of the vehicle occupied, and then, (b) the insurer of the operator of the vehicle occupied.

Docket No. 319342:

Anselmi & Mierzejewski, PC (by *Kevin P. Wirth*), for Titan Insurance Company.

Liedel Law Group (by *William J. Liedel*) for American Country Insurance.

Docket No. 321598:

Law Offices of Ronald M. Sangster PLLC (by *Ronald M. Sangster, Jr.*,) and *Harvey Kruse PC* (by *Lanae L. Monera*) for Titan Insurance Company.

Liedel Law Group (by *William J. Liedel*) for American Country Insurance.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and STEPHENS, JJ.

RONAYNE KRAUSE, P.J. This consolidated appeal stems from motor vehicle accidents involving uninsured drivers. At issue is which insurance providers are responsible for the claims in issue. In Docket No. 319342, the Wayne Circuit Court granted defendant American Country Insurance Company's (American Country) motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiff Titan Insurance Company (Titan) appeals as of right. In Docket No. 321598, the Kalamazoo Circuit Court affirmed the district court's decision granting judgment in favor of Titan against American Country.[1] American Country appeals by leave granted. *Bronson*

[1] Disputed claims involving Bronson Methodist Hospital are not at issue in this appeal, as this Court granted Bronson's motion to be dismissed as a party to the appeal. *Bronson Methodist Hosp v Titan Ins Co*, unpublished order of the Court of Appeals, entered June 12, 2015 (Docket No. 321598).

Methodist Hosp v Titan Ins Co, unpublished order of the Court of Appeals, entered September 29, 2014 (Docket No. 321598). We reverse in Docket No. 319342 and affirm in Docket No. 321598.

In Docket No. 319342, Stanley Hughes was injured in a motor vehicle accident while operating a van owned by and registered to Safe Arrival Transportation, which is in the business of transporting passengers. The van was uninsured. Hughes, an independent contractor for Safe Arrival, did not have a personal no-fault policy. Titan was assigned to handle Hughes's claim. Titan thereafter filed suit against American Country, which insured another vehicle owned by Safe Arrival, asserting that American Country is the higher priority insurer and that Titan was entitled to reimbursement from American Country. The parties filed cross-motions for summary disposition, each asserting that the other was the higher priority insurer. Following oral argument, the trial court granted American Country's motion and denied Titan's. Titan moved for reconsideration, which the trial court denied.

In Docket No. 321598, George Slack was injured in a motor vehicle accident while driving a van for Bronco Express Company, a taxi service company. Slack did not have a personal insurer. The van was uninsured, but American Country insured other vehicles owned by Bronco Express. Slack was treated at Bronson Methodist Hospital, which later sought reimbursement. The claim was assigned to Titan, but Titan denied it, asserting that American Country was responsible for the claim under the no-fault act, MCL 500.3101 *et seq*., because it insured other vehicles owned by Bronco Express. However, American Country also denied the claim. Bronson thereafter filed suit in district court against Titan and American Country, and Titan cross-

claimed against American Country. American Country then moved for summary disposition. The district court held that American Country was responsible for the claim. American Country then appealed in the circuit court, which affirmed the district court's holding. American Country moved for reconsideration, which the court denied.

At issue in this case is the priority of insurers under MCL 500.3114, a question of statutory interpretation, which this Court reviews de novo. *Vitale v Auto Club Ins Ass'n*, 233 Mich App 539, 542; 593 NW2d 187 (1999). MCL 500.3114 provides as follows:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in [MCL 500.3103(2)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in [MCL 500.3103(2)] are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.
>
> (2) A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the department of transportation.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in [MCL 500.3101 or MCL 500.3102].

(f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.

(3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

(4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

(5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

(b) The insurer of the operator of the motor vehicle involved in the accident.

(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

(6) If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers.

Generally, pursuant to MCL 500.3114(1), a person must seek personal protection insurance (PIP) benefits from his or her own insurer. *Farmers Ins Exch v Farm Bureau Gen Ins Co*, 272 Mich App 106, 111; 724 NW2d 485 (2006). However, the exceptions in Subsections (2), (3), and (5) supersede this general rule. *Id*. If no insurance is available, a person may obtain benefits through the Assigned Claims Plan, which serves as the insurer of last priority. MCL 500.3172; *Cason v Auto Owners Ins Co*, 181 Mich App 600, 610; 450 NW2d 6 (1989).

All parties agree that because Hughes and Slack were operators of motor vehicles in the business of transporting passengers, we must first examine Subsection (2). Subsection (2) states that the injured person is entitled to PIP benefits from the insurer of the motor vehicle. However, because the vehicles in both cases were uninsured, Subsection (2) does not apply. At issue, then, is whether the other subsections of MCL 500.3114 can still be applied. Titan argues that other subsections of the statute indeed apply and because insurance is not available under Subsection

(1), Subsection (4) should apply. Under this reading of the statute, American Country would be liable under MCL 500.3114(4)(a), because it insured other vehicles owned by Safe Arrival and Bronco Express. See *Farmers Ins Exch*, 272 Mich App at 113-114; *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330, 335-337; 652 NW2d 469 (2002). American Country counters that there is no indication in the statute that once it is determined that insurance is unavailable under Subsection (2), Subsection (4) applies. It argues that because there is no insurance available under Subsection (2), Titan, as the assigned insurer, is responsible.

In Docket No. 319342, the circuit court held that because Subsection (2) was the most relevant subsection given the circumstances of this case, it was "the only provision that applies to [Hughes's] injuries . . . ." The court concluded that because there was no insurance available under Subsection (2), the Assigned Claims Plan was responsible for Hughes's claim. The court also reasoned that there was nothing in MCL 500.3114 indicating that if insurance is not available under Subsection (2) that Subsection (4) would then apply.

In Docket No. 321598, the circuit court reached the opposite conclusion. American Country had relied on the language "[e]xcept as provided in subsections (1) to (3)," found at the beginning of Subsection (4), to argue that if Subsections (1) through (3) could apply but insurance was not available, Subsection (4) would not apply. The circuit court rejected that argument, saying that it "would make that particular provision of four mean that if anyone, for whatever reason, could show that for subparagraph 1 or subparagraph 3 that there was not an insurer available that somehow that would

accept [sic] that individual . . . from resorting to subsection (4)." The court said that it did not "believe that the language as relates to the quoted passage is saying that an individual is precluded from using four if it could theoretically fall within the purview of one, two, or three." The court accordingly held that because insurance was not available under Subsections (1) through (3), Subsection (4) applied, and American Country was responsible for the claim.

Turning for guidance to cases examining the interaction of other subsections of the statute, we discern a general rule that when an exception to Subsection (1) should apply but insurance is not available, the general rule of Subsection (1) applies. In *Auto-Owners Ins Co v Lombardi Food Serv, Inc*, 137 Mich App 695, 696-697; 358 NW2d 923 (1984), an employee was injured while riding in a truck that was owned or leased by his employer, and thus Subsection (3) would have been applicable. However, the employer had failed to insure the truck. *Id*. at 696. The Court held that the employee's personal insurer was liable under Subsection (1). *Id*. at 697. See also *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 206; 393 NW2d 833 (1986) (stating that when no insurance is available under Subsection (3), the employee is entitled to benefits from his or her personal insurer under Subsection (1)). In *Frierson v West American Ins Co*, 261 Mich App 732, 733-737; 683 NW2d 695 (2004), the plaintiff was injured while a passenger on a motorcycle in an accident involving a motor vehicle, and therefore Subsection (5) would have been applicable. However, the insurers who would have been liable under that subsection were unidentifiable. *Id*. at 737. The Court held that under *Parks*, the plaintiff's personal insurer was liable under Subsection (1). *Id*. at 737-738. In addition, the Court broadly stated, "[W]hen an insurer that

would be liable under one of the exceptions in MCL 500.3114(1) cannot be identified, the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Id*. at 738. As applied in the present case, because there is no identifiable insurance under Subsection (2), if Hughes and Slack had personal insurers, those personal insurers would be responsible for their benefits under Subsection (1).

Caselaw demonstrates that when Subsection (1) applies but an insurer is not available, as is the case here, Subsection (4) applies next. See *Mich Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990) (stating that when insurance is not available under Subsection (1), Subsection (4) applies). In *Parks*, 426 Mich at 203 n 3, our Supreme Court stated, "Those injured while occupants of motor vehicles must look to the rules provided in subsections 1, 2, and 3 before applying the priorities listed in subsection 4." (Emphasis omitted.) Indeed, this Court has stated that Subsections (1) and (4) together establish "the general order of priority . . . ." *Mich Mut Ins Co*, 183 Mich App at 631. Accordingly, if an exception provided in Subsections (2), (3), or (5) would apply but insurance is not available, Subsections (1) and (4) apply in tandem.

It is always possible that a person injured in a motor vehicle accident will have a personal policy and insurance will thus be available under Subsection (1). Under American Country's argument, because Subsection (1) could theoretically apply, Subsection (4) could never apply. This Court must avoid an interpretation that would render statutory language surplusage. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). Instead, Subsection (4) plainly governs which insur-

ance applies when insurance is unavailable under Subsection (1). That is, the language "[e]xcept as provided in subsections (1) to (3)" at the beginning of Subsection (4) means "if insurance is not available under Subsections (1) to (3)." As applied in the present cases on appeal, under Subsection (4), because American Country insured other vehicles owned by Safe Arrival and Bronco Express, it is responsible for the claims in these cases.

We reverse in Docket No. 319342 and affirm the lower court in Docket No. 321598. We remand Docket No. 319342 for further proceedings consistent with this opinion. We do not retain jurisdiction.

STEPHENS, J., concurred with RONAYNE KRAUSE, P.J.

GLEICHER, J. (*concurring*). These consolidated cases arise from two accidents involving two uninsured vans engaged in the business of transporting passengers. Defendant American Country Insurance Company insured other vehicles registered to the vans' owners. In both cases, plaintiff Titan Insurance Company was tapped by the assigned claims plan to handle the ensuing personal protection insurance (PIP) claims. The lead opinion holds that pursuant to a single sentence of obiter dictum contained in a 1986 footnote, American Country stands in higher priority than Titan and therefore must adjust the claims. I concur, but write separately to suggest that the text of the governing statute merits renewed consideration by the Supreme Court.

This case turns on the formula governing priority. MCL 500.3114 addresses "the order in which various potentially liable insurers will be required to cover a claim for benefits." *Parks v Detroit Auto Inter-Ins Exch*,

426 Mich 191, 201; 393 NW2d 833 (1986). The lead opinion holds that a subsection of the statute—MCL 500.3114(4)—controls the priority analysis in this case. According to Subsection (4), the lead opinion declares, American Country must manage the claims because it insured other vehicles owned by or registered to the two transportation businesses. I agree that a footnote in *Parks* compels this result. See *Parks*, 426 Mich at 203 n 3. Were we writing on a clean slate, I would hold the priority rules set forth in MCL 500.3114 ambiguous when applied to PIP claims arising from commercial vehicle accidents such as the two involved here.

A trio of foundational principles animates Michigan's no-fault act, MCL 500.3101 *et seq*. Losses occasioned by accidental bodily injury arising from the operation of a motor vehicle are compensated through a system of PIP benefits, payable without regard to fault. The owner or registrant of a vehicle must purchase PIP coverage, which usually covers any losses sustained by the individual. MCL 500.3105. "[I]n a majority of cases, specific recognized losses suffered as a result of motor vehicle accidents will be compensated for by a person's own insurer." *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 240; 293 NW2d 594 (1980).

The Legislature understood that despite the act's coverage imperative, the no-fault system would necessarily have to accommodate the PIP needs of uninsured occupants of uninsured vehicles. This recognition yielded the contemporaneous enactment of a back-up plan, a priority system specifying a method for payment of PIP benefits when an injured person lacked no-fault coverage. MCL 500.3114 maps the course of such priority determinations. At the end of the priority road stands the insurer of last priority: the Michigan Assigned Claims Plan (MACP) (successor to the Michi-

gan Assigned Claims Facility). MCL 500.3172(1). An injured person looks to the MACP for PIP coverage

> if no [PIP] is applicable to the injury, no [PIP] applicable to the injury can be identified, the [PIP] applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable [PIP] applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. [MCL 500.3172(1).]

Before they resort to the MACP, the no-fault act contemplates that claimants will utilize MCL 500.3114's priority system to determine where to seek coverage among no-fault insurers. MCL 500.3114(1) states the general rule that a PIP policy applies to "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household[.]" Thus, an injured person usually turns to his or her own policy first, even if the injury arises from the operation of an uninsured vehicle.

Subsection (2) creates an exception to the rule set forth in Subsection (1). An injured driver or occupant of a motor vehicle "operated in the business of transporting passengers" must look to "the insurer of the motor vehicle" for PIP benefits, and not his or her own insurer. This rule is subject to its own discrete exceptions, narrowing its reach. This subsection states in its entirety:

> A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the [PIP] benefits to which the person is entitled *from the insurer of the motor vehicle*. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to [PIP] benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the department of transportation.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in [MCL 500.3101 or MCL 500.3102].

(f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point. [MCL 500.3114(2) (emphasis added).]

This Court has thoughtfully summarized that MCL 500.3114(2) and its exceptions

> relate to "commercial" situations. It was apparently the intent of the Legislature to place the burden of providing no-fault benefits on the insurers of these motor vehicles, rather than on the insurers of the injured individual. This scheme allows for predictability; coverage in the "commercial" setting will not depend on whether the injured individual is covered under another policy. A company issuing insurance covering a motor vehicle to be used in a [Subsection (2)] . . . situation will know in advance the scope of the risk it is insuring. The benefits will be speedily paid without requiring a suit to determine which of the two companies will pay what is admittedly due by one of them. [*State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114-115; 283 NW2d 661 (1979).]

MCL 500.3114(2) plainly provides that (with carefully delineated exceptions) when a vehicle used in the commercial transportation of customers is involved in an injury-producing accident, the insurer of the commercial vehicle provides PIP coverage. The Legislature omitted from this subsection any priority fall-back

rules, despite that the Legislature undoubtedly foresaw that injuries would arise from accidents involving *uninsured* commercial vehicles. Although the Legislature took pains to carve out discrete exceptions to Subsection (2), it notably omitted mention of or reference to a back-up plan governing the foreseeable risk that an owner of a commercial vehicle in the business of transporting passengers would fail to insure it.[1]

In this sense, Subsection (2) could logically be interpreted to function in a manner akin to a light switch. When turned on, coverage responsibility falls to the vehicle's insurer. When turned off, there is no coverage, which means that coverage automatically defaults to the insurer of last resort—the MACP. The Legislature's omission of an alternative priority scheme in the subsection specifically addressing vehicles operated in the business of transporting passengers could mean that the Legislature did not intend to place responsibility on a specific insurer that had not undertaken the risk of insuring the commercial vehicle. After all, "[i]t is impossible to hold an insurance company liable for a risk it did not assume." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).[2]

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[1] The exceptions for school buses, taxicabs, and other specifically identified commercial vehicles place the responsibility for PIP coverage on the passenger's no-fault carrier, "unless that passenger is not entitled to [PIP] benefits under any other policy[.]" MCL 500.3114(2). Thus, the exceptions reinstate the general rule that one looks to one's own insurer for PIP coverage. The Legislature decreed that the insurers of a relatively small subset of commercial vehicles, such as the two vans involved in this case, would be liable for PIP benefits regardless of whether the injured person had his or her own no-fault policy.

[2] The MACP serves as an exception to this rule. The plan is a safety net, of sorts, designed to supply coverage for injured and uninsured automobile accident victims. The plan shifts the costs of care from the taxpayers or medical-care providers, placing it on the insurers who write most of the no-fault coverage policies in this state.

Alternatively, and as the lead opinion holds, Subsection (4) serves as the priority road map for vehicles operated in the business of transporting passengers, even though such vehicles are not mentioned in that subsection and appear to be specifically *exempted* from its reach:

> *Except as provided in subsections (1) to (3)*, a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied. [MCL 500.3114(4) (emphasis added).]

What does the phrase "[e]xcept as provided in subsections (1) to (3)" mean in the context of Subsection (4)? It could mean that except when there is coverage, as set forth in Subsection (2), the rules of Subsection (4) apply. The lead opinion affords this meaning to the "except" clause, and I concur that this is a rational reading of MCL 500.3114(4). Moreover, the Supreme Court's footnote in *Parks* seems to dictate this result, as it states: "Those injured while *occupants* of motor vehicles must look to the rules provided in subsections 1, 2, and 3 before applying the priorities listed in subsection 4." *Parks*, 426 Mich at 203 n 3.[3]

Application of that rule in this case means that American Country is responsible for the PIP claims at issue, despite that American Country never agreed to insure the commercial vehicles involved in the accidents and never received a single dollar in premium

[3] *Parks* involved a claim governed by MCL 500.3114(3), and not Subsection (2).

payments for coverage of those vehicles. If MCL 500.3114(4) governs this priority dispute, the law has created a contract that did not exist, and holds American Country liable for risks it never assumed.

I submit that an alternate interpretation is equally valid: Subsection (2) operates as a stand-alone provision because it deals with a subset of vehicles presenting unique considerations. Owners of vehicles used to transport passengers are required to purchase PIP policies from no-fault insurers. Those no-fault insurers are required to pay PIP benefits to drivers and passengers of such insured commercial vehicles. Here, the vehicles were uninsured. *Parks* dictates that we burden American Country with coverage responsibility because American Country insured *other* vehicles owned or registered by the same (lawbreaking) businesses, rather than spreading the risk to all insurers writing no-fault policies in Michigan (as ordinarily occurs when the MACP serves as the default). American Country bears responsibility despite that it had no opportunity to underwrite the risks it undertook by insuring some (or perhaps even one) vehicle in a larger fleet.

Perhaps this is what the Legislature intended. But given the plain language of Subsections (2) and (4), I find it equally plausible that the Legislature envisioned that if a commercial transportation service owner failed to obtain PIP coverage for some vehicles in his or her fleet, the risk would be spread to all insurers subject to assigned claims obligations, rather than being borne solely by the innocent insurer for the remaining vehicles.

PEOPLE v HUMPHREY

Docket No. 320353. Submitted May 13, 2015, at Detroit. Decided September 15, 2015, at 9:10 a.m. Leave to appeal denied 499 Mich 870.

Christopher Dorian Humphrey was charged in the Wayne Circuit Court with carrying a concealed weapon (CCW), MCL 750.227(2). Defendant filed a motion to dismiss the CCW charge against him because the concealed handgun he was carrying at the time of his detention was missing a firing pin and was therefore inoperable. The court, Dana Margaret Hathaway, J., granted defendant's motion and dismissed the charge. The prosecution appealed.

The Court of Appeals *held*:

The trial court abused its discretion by granting defendant's motion to dismiss because the operability of a firearm is not relevant to firearms offenses contained in Chapter XXXVII of the Michigan Penal Code. The inoperability of a pistol is not an affirmative defense to CCW. In this case, defendant's pistol was not operable because it was missing a firing pin. Defendant argued that caselaw supported his assertion that he could not be guilty of CCW, MCL 750.227(2), if the weapon he carried—a pistol, in this case—was completely unusable and could not easily be made operable. Defendant's argument failed to recognize that the Michigan Supreme Court had interpreted the term "firearm," as it was defined in MCL 750.222, and as it should be interpreted for all offenses in Chapter XXXVII of the Michigan Penal Code, including CCW, to mean the type of weapon designed or intended to propel a dangerous projectile by means of an explosive, gas, or air. The statutory language does not reflect the Legislature's intention that operability be a factor in disposing of a CCW charge. The Supreme Court's interpretation of "firearm" governed defendant's case despite Court of Appeals caselaw to the contrary. Additional support for the Supreme Court's interpretation of "firearm" is found in MCL 750.222(e), as amended. That statute defines "firearm" as "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive." In consonance with the Supreme Court's interpretation of "firearm" at the time of defendant's detention, and the current

version of MCL 750.222(e), which mirrors the Court's interpretation, the operability of defendant's weapon was irrelevant to whether he may be charged with and convicted of CCW. That is, a defendant could be convicted of CCW even if the concealed weapon carried by the defendant is inoperable.

Reversed and remanded.

CRIMINAL OFFENSES — FIREARMS — CARRYING A CONCEALED WEAPON — OPERABILITY OF WEAPON.

The operability of a weapon is irrelevant to whether an individual may be charged with and convicted of carrying a concealed weapon under MCL 750.227(2); a weapon is a firearm for purposes of MCL 750.227(2) if the weapon is designed or intended to propel a dangerous projectile by means of an explosive, gas, or air, and a defendant may not raise as an affirmative defense the fact that the weapon was inoperable at the time it was confiscated; the amended definition of "firearm" in MCL 750.222(e), which applies to all firearms offenses in Chapter XXXVII of the Penal Code, is "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive."

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Valerie M. Steer*, Assistant Prosecuting Attorney, for the people.

Melvin Houston for defendant.

Before: WILDER, P.J., and OWENS and M. J. KELLY, JJ.

WILDER, P.J. The prosecution appeals as of right a circuit court order granting defendant's motion to dismiss the charge against him of carrying a concealed weapon (CCW), MCL 750.227(2). On appeal, the prosecution argues that under the Michigan Supreme Court's interpretation of "firearm" under MCL 750.222(d) (providing the legal definition of "firearm" for offenses in Chapter XXXVII of the Michigan Penal

Code),[1] the inoperability of a pistol is not a valid affirmative defense to a CCW charge, and therefore, the trial court erroneously dismissed defendant's CCW charge. We agree and reverse.

I. FACTS AND PROCEDURAL HISTORY

At approximately midnight on January 7, 2012, Detroit Police Officer Johnny Strickland and another officer were patrolling the area of St. Marys Street and McNichols Road in Detroit, Michigan, in a fully marked police car. Strickland observed defendant and another individual walking along the street despite the availability of a pedestrian sidewalk, an offense for which Strickland was authorized to issue a ticket. Strickland and the other officer approached defendant, and defendant looked in their direction. When the officers stopped and got out of the car, defendant "immediately reached . . . toward his right pocket as if he was trying to reach into his pants." Strickland instructed defendant to place his hands in the air, but defendant fled when Strickland approached him. Strickland told defendant to stop, identified himself as a police officer, and ran after defendant. After chasing defendant for less than a block, Strickland caught up with him and immediately detained him, at which time defendant again attempted to reach into his right pants pocket. After Strickland handcuffed defendant, he frisked the area where defendant had reached and felt a handgun through defendant's pants. Defendant did not produce a valid concealed pistol license, and the weapon had not been visible before it was removed from defendant's pants because "he had on two pair of

[1] MCL 750.222 was amended by 2015 PA 26, effective July 1, 2015, to add several definitions. Consequently, the definition of "firearm" is now found in MCL 750.222(e).

pants, [and] it was in the pants that [were] underneath the first pair." Strickland could not recall if he ever inspected the weapon to determine if it had been loaded or operable.

On November 11, 2013, the trial court entered an order requiring the Detroit Police Department to perform ballistics testing on the weapon seized from defendant in order "to determine whether the weapon is currently operable (i.e., capable of propelling a dangerous projective [sic: projectile])." According to the laboratory report prepared by the Forensic Science Division of the Michigan State Police, dated February 5, 2012, well before the court's order for ballistics testing, "[t]he submitted firearm did not function in the condition it was received [sic], due to a missing firing pin."

On January 6, 2014, defendant filed a motion to dismiss the CCW charge against him. Defendant argued that the trial court should dismiss the CCW charge because the Michigan State Police ballistics report indicated that the weapon seized from defendant "was missing a firing pin and, as a result, could not be easily made operable at the time." According to defendant, this demonstrated that there was insufficient evidence to support one of the critical elements of the CCW charge. In support of his position, defendant asserted that there previously was a split of authority regarding whether an inoperable weapon could give rise to a CCW charge, but that subsequent cases resolved the issue and indicated that "an affirmative defense to the charge of carrying a concealed pistol can be made by the presentation of proof that the pistol in question would not fire and could not readily be made to fire a projectile." Accordingly, defendant argued that no reasonable trier of fact could find that the weapon recovered from defendant was operable, and therefore, the trial court

should dismiss the CCW charge because the pistol did not constitute a firearm under MCL 750.222, which provides the definition relevant to MCL 750.227(2).

After a hearing on defendant's motion, the trial court ruled as follows:

> Okay. I took an opportunity, I read [*People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006)] as well as the other cases that are cited in the Criminal Jury Instruction 11.6 because I thought that they would be helpful. My main issue with [*Peals*] is that it makes it clear time and time again that it applies to felon in possession and felony firearm.
>
> I tend to agree . . . that if there was a CCW charge within that particular case it probably would have applied it. However, throughout it's [sic] holding it distinguishes between the CCW charges and felon in possession and felony firearm. So I think this is a call that, for another court. I'm going to dismiss this case.
>
> I think that ultimately the Court of Appeals or the Michigan Supreme Court has to clarify whether or not there [sic] new found opinion with respect to operability under firearms further extends to CCW. 'Cause I haven't seen anything in the case law saying that it doesn't. Other than the [*Peals*] case, which is very clearly applies [sic] to felony firearm and felon in possession.
>
> So you're probably right. And the Court's going to get there eventually. I just don't think that they've done it yet. And this might be the case to do it. So, I'm going to dismiss it.

Accordingly, on January 28, 2014, the trial court entered an order dismissing the CCW charge for the reasons stated on the record.

II. STANDARDS OF REVIEW

This Court "review[s] for an abuse of discretion a trial court's decision on a motion to dismiss," *People v*

Stone, 269 Mich App 240, 242; 712 NW2d 165 (2005), which occurs "when [the trial court's] decision falls outside the range of principled outcomes," *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). However, this Court reviews de novo questions of law on which a dismissal is based. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002). Additionally, "[q]uestions of statutory construction are reviewed de novo." *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

III. THE OPERABILITY OF A PISTOL IS NOT RELEVANT TO CHARGES BROUGHT UNDER CHAPTER XXXVII OF THE MICHIGAN PENAL CODE

The prosecution charged defendant with violating MCL 750.227(2), which provides:

> A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

At the time of the instant offense, MCL 750.222(e) defined the term "pistol"[2] as "a loaded or unloaded firearm that is 30 inches or less in length, or a loaded

[2] 2012 PA 242 amended MCL 750.222, effective January 1, 2013. Although the definition of "pistol" changed slightly—the maximum length of a pistol was changed from 30 inches to 26 inches—the definition of "firearm" remained the same. However, MCL 750.222, including the definition of "firearm," was later amended by 2015 PA 26, effective July 1, 2015, and 2015 PA 28, effective August 10, 2015. The relevance of these amendments is discussed later in this opinion. "[A] statute is presumed to operate prospectively unless [a] contrary intent is clearly manifested," but "an exception to this general rule is recognized if a statute is remedial or procedural in nature." *People v Conyer*, 281

or unloaded firearm that by its construction and appearance conceals itself as a firearm."[3] Additionally, at the time of the instant offense, the term "firearm," which applied to all offenses in Chapter XXXVII of the Michigan Penal Code, meant "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's [sic] not exceeding .177 caliber." MCL 750.222(d).

As recognized in *People v Brown*, 249 Mich App 382, 384; 642 NW2d 382 (2002), "this Court has accorded various meanings to the statutory term 'firearm,' depending on the specific offense with which the defendant has been charged." Thus, while this Court found that an inoperable weapon qualified as a firearm for purposes of MCL 750.227b (possession of a firearm during the commission of a felony (felony-firearm)), and MCL 750.224f (felon in possession of a firearm (felon-in-possession)), *Brown*, 249 Mich App at 384-385, this Court has also held that the fact that a pistol was inoperable afforded a defendant an affirmative defense to a CCW charge:

> This Court has . . . held that a pistol, as defined under the concealed weapons statute, must be operable. *People v Gardner*, 194 Mich App 652; 487 NW2d 515 (1992). That is, the pistol must be capable of propelling the requisite-sized dangerous projectile or of being altered to do so within a reasonably short time. *Id*., p 654; *People v Huizenga*, 176 Mich App 800, 806; 439 NW2d 922 (1989). An affirmative defense to a charge of carrying a concealed

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Mich App 526, 529; 762 NW2d 198 (2008) (quotation marks and citations omitted; second alteration in original).

[3] The definition of pistol found in MCL 750.222(e) applies to all the crimes included in Chapter XXXVII of the Michigan Penal Code, MCL 750.222 through MCL 750.239a.

> pistol can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire. *Gardner*, *supra*. [*People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992).]

Consistent with this caselaw, subsequent opinions issued by this Court, and both the former and current versions of the model criminal jury instructions, recognize that an inoperable handgun does not constitute a firearm for purposes of the CCW statute, and that a defendant is not guilty of CCW when the gun is completely unusable and cannot be easily made operable. See, e.g., *Brown*, 249 Mich App at 384; M Crim JI 11.6; CJI2d 11.6.

However, in *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006), the Michigan Supreme Court considered whether the defendant possessed a firearm, as defined in MCL 750.222(d), and was therefore properly convicted of felon-in-possession, MCL 750.224f(1), and felony-firearm, MCL 750.227b. The Supreme Court held:

> [T]he text of the statutory definition indicates that a weapon is a firearm if it is the type of weapon that was designed or intended to propel a dangerous projectile by an explosive, gas, or air. The definition describes the category of weapons that constitute a "firearm," but it does not prescribe a requirement that the weapon be "operable" or "reasonably or readily repairable." In other words, the design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a "firearm." [*Peals*, 476 Mich at 638.]

Thus, the Supreme Court concluded, "the statute requires only that the weapon be of a type that is designed or intended to propel a dangerous projectile." *Id*. at 642. The Supreme Court noted in its analysis that this Court has attributed different meanings to the term "firearm," depending on the charged offense:

> [T]he Court of Appeals has held, after [*People v*] *Hill* [433 Mich 464; 446 NW2d 140 (1989)], that proof of operability is not required to establish the offense of felon in possession of a firearm. In [*Brown*, 249 Mich App 382], *the Court of Appeals noted that various meanings had been accorded to the term "firearm," depending on the offense with which the defendant had been charged*. In the context of the concealed weapons statute, MCL 750.227, the Court of Appeals had held that an inoperable handgun was not a "firearm." See [*Parr*, 197 Mich App at 45], [*Gardner*, 194 Mich App at 654], and [*Huizenga*, 176 Mich App at 804-805]. But in the context of the felony-firearm statute, the *Brown* Court noted that Court of Appeals case law does not require proof of operability. See [*People v Thompson*, 189 Mich App 85; 472 NW2d 11 (1991)]; [*People v Garrett*, 161 Mich App 649; 411 NW2d 812 (1987)]; and [*People v Poindexter*, 138 Mich App 322; 361 NW2d 346 (1984)]. The *Brown* Court concluded "that the *Thompson* analysis, first applied to felony-firearm cases, should also be applied to felon[-]in[-]possession cases." *Brown*, 249 Mich App at 384-385. [*Peals*, 476 Mich at 647-648 (emphasis added).]

Additionally, although an apparent secondary consideration, the Supreme Court also noted that its interpretation of the statutory definition was consistent with this Court's existing caselaw regarding the specific offenses at issue in *Peals*:

> As discussed, we believe the statutory definition of "firearm" is clear. MCL 750.222(d) plainly provides that a weapon is a firearm if it is the type of weapon that propels dangerous projectiles by an explosive or by gas or air. Moreover, as noted earlier, the existing Court of Appeals case law provides that inoperability is not a defense to either felony-firearm or felon in possession of a firearm. [*Id*. at 655.]

The Supreme Court made no specific pronouncement that its interpretation of the term "firearm" under MCL 750.222(d) was applicable to all firearms cases. Nevertheless, the clear implication is that, given

the plain language of the statute, the Supreme Court's construction of the term "firearm" is the only viable interpretation of the term as it concerns all the crimes defined in MCL 750.222 through MCL 750.239a. *Peals*, 476 Mich at 655-656; see *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013) ("When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required."). Thus, in the instant case, the trial court was bound by the Michigan Supreme Court's pronouncement in *Peals*, 476 Mich at 655, that the definition of "firearm" in MCL 750.222(d) was "clear" and "plain[]," and that "the design and construction of the weapon, rather than its state of operability, are relevant in determining whether [the weapon] is a 'firearm,' " *id*. at 638. This Court is also bound by *Peals*, and we hold that *Peals* overruled the holding in *Gardner* that the inoperability of a pistol is an affirmative defense to a CCW charge. *Gardner*, 194 Mich App at 654-655.

IV. CONCLUSION

"[A] trial court's misapplication or misunderstanding of the law in reaching its decision . . . may constitute an abuse of discretion." *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003). In this case, the trial court abused its discretion by granting defendant's motion to dismiss the CCW charge because, under *Peals*, the operability of a firearm is not relevant to firearms offenses under Chapter XXXVII of the Michigan Penal Code, and the inoperability of a pistol is no longer a valid affirmative defense to a CCW charge.[4]

[4] The new definition of "firearm" prescribed by 2015 PAs 26 and 28 supports our conclusion that operability is no longer a defense to a CCW

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

OWENS and M. J. KELLY, JJ., concurred with WILDER, P.J.

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charge. Under the new definition, a " '[f]irearm' means any weapon which will, *is designed to*, or may readily be converted to expel a projectile by action of an explosive." MCL 750.222(e) (emphasis added). This definition, like the former definition interpreted by the Michigan Supreme Court in *Peals*, "describes the category of weapons that constitute a 'firearm,' but . . . does not prescribe a requirement that the weapon be 'operable' or 'reasonably or readily repairable,' " and indicates that "*the design* and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a 'firearm.' " *Peals*, 476 Mich at 638. Thus, we conclude that the reasoning employed in *Peals* is still viable under the amended definition. See also *id*. at 642 ("[T]he statute requires only that the weapon be of a type that is *designed* or intended to propel a dangerous projectile.") (emphasis added).

PEOPLE v FEELEY

Docket No. 325802. Submitted August 5, 2015, at Lansing. Decided September 15, 2015, at 9:15 a.m. Reversed and remanded 499 Mich 429.

The 53rd District Court, Carol Sue Reader, J., refused to bind Ryan Scott Feeley over for trial on the charge of resisting and obstructing a police officer, a charge that resulted from defendant's failure to comply with a Brighton reserve police officer's command. The reserve police officer and a full-time police officer responded to a call from a bar for assistance with a fight occurring there. When the officers arrived on the scene, defendant was identified as the individual causing the problem. When defendant ran away from the reserve police officer after the reserve officer asked to speak with defendant, the reserve officer identified himself as a police officer, and he ordered defendant to stop. Defendant stopped after the reserve officer's second command, looked at the reserve officer, uttered an expletive, and began reaching behind his back. The reserve officer pulled his weapon and ordered defendant to the ground. Defendant complied, and with help from two other officers, defendant was taken into custody. The court refused to bind defendant over for trial because the court concluded that failure to comply with the command of a reserve police officer was not within the scope of MCL 750.81d. The prosecution filed an application for leave to appeal the district court's decision. The Livingston Circuit Court, Michael P. Hatty, J., denied the application for lack of merit. The prosecution appealed by leave granted.

The Court of Appeals *held*:

The district court properly refused to bind defendant over on the charge of resisting and obstructing, and the circuit court properly denied leave to appeal the district court's decision, because the applicable statute, MCL 750.81d, does not include reserve police officers in the list of persons with whose lawful orders an individual must comply when the officers are engaged in the performance of their duties. The resisting and obstructing statute penalizes an individual who knows, or has reason to know, that a person is engaged in the performance of his or duties, and who assaults, batters, wounds, resists, obstructs, opposes, or

endangers that person during the performance of those duties. The statute defines "person" by including a detailed list of occupations to which the statute applies. "Reserve police officer" is not included in that list of occupations. If the Legislature intended to penalize a defendant's resistance to, and obstruction of, a reserve police officer's performance of his or her duties, the Legislature would have included reserve police officers in the statutory list. Because it did not, and because it did expressly list a significant number of occupations, the plain language of the statute requires the exclusion of reserve police officers from the scope of the statute. Thus, the district court properly refused to bind defendant over for trial on the resisting and obstructing charge. In addition, the circuit court properly denied the prosecution's application for leave to appeal the district court's decision.

Affirmed.

SAWYER, P.J., dissenting, would have reversed the district and circuit courts, reasoning that MCL 750.81d(7)(b) ought to be broadly interpreted to include reserve police officers as "persons" with whose lawful orders an individual must comply when the orders are issued during the performance of the officers' duties. Nothing in the language of MCL 750.81d suggests that reserve police officers should not be considered police officers for purposes of the statute. The statute neither explicitly includes reserve police officers in its definition of "person," nor does it explicitly exclude reserve police officers from the definition. The distinction between a reserve police officer and a full-time police officer depends not on the nature of their service to the jurisdiction, but on the nature of their schedules. Reserve police officers are part-time officers who work when full-time officers are on vacation or call in sick. Because a reserve police officer is tasked with the same duties as a full-time police officer, an individual who refuses to comply with the lawful order of a reserve police officer should face the same criminal liability as would an individual who refuses to comply with the lawful order of a full-time police officer.

CRIMINAL OFFENSES — RESISTING AND OBSTRUCTING — DEFINITION OF POLICE OFFICER.

MCL 750.81d, the statute prohibiting resisting and obstructing a police officer, does not penalize individuals who refuse to comply with a reserve police officer's command to stop; the resisting and obstructing a police officer statute expressly lists a number of occupations included in its definition of "person" with whose lawful orders an individual must obey when that person is

> engaged in the performance of his or her duties, and the individual knows, or has reason to know, that the person is performing those duties; a reserve police officer is not expressly mentioned in the list of occupations to which the statute applies, and thus, the plain language of the statute does not support the prosecution's argument that a reserve police officer falls within the scope of the statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *William J. Vailliencourt, Jr.*, Prosecuting Attorney, for the people.

Fraser Trebilcock Davis & Dunlap, PC (by *Brian P. Morley*), for defendant.

Before: SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ.

SHAPIRO, J. Defendant was arrested and charged with resisting and obstructing a police officer, MCL 750.81d, for failing to comply with the command of a Brighton reserve police officer. At the conclusion of the preliminary hearing, the district court denied the prosecution's bindover request on the grounds that failure to comply with the command of a reserve police officer was not within the scope of the statute. The circuit court denied the prosecution's application for leave to appeal the district court's order, and the prosecution appealed in this Court by leave granted.[1] We affirm.[2]

The resisting and obstructing statute, MCL 750.81d, states:

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[1] *People v Feeley*, unpublished order of the Court of Appeals, entered April 3, 2015 (Docket No. 325802).

[2] Generally, a district court's decision to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Fletcher*, 260 Mich App 531, 551; 679 NW2d 127 (2004). However, this case involves questions of statutory interpretation, which are reviewed de novo. See *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a *person* who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

* * *

(7) As used in this section:

(a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

(b) *"Person" means any of the following*:

(*i*) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

(*ii*) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(*iii*) A conservation officer of the department of natural resources or the department of environmental quality.

(*iv*) A conservation officer of the United States department of the interior.

(*v*) A sheriff or deputy sheriff.

(*vi*) A constable.

(*vii*) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.

(*viii*) A firefighter.

(*ix*) Any emergency medical service personnel described in . . . MCL 333.20950.

> (*x*) An individual engaged in a search and rescue operation as that term is defined in section 50c. [Emphasis added.]

The prosecution contends that by implication, reserve police officers fall under Subsection (7)(b)(*i*), i.e., "[a] police officer of . . . a political subdivision of this state . . . ." When interpreting statutes, we are required to look at the plain language of the statute to discern the Legislature's intent. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). In the resisting and obstructing statute, the Legislature did not include the term "reserve police officer" in the definition of persons whose lawful orders must be obeyed in order to avoid criminal liability. Many other law enforcement personnel one might reasonably consider implicitly included in the term "police officer" were nevertheless explicitly listed in the statute. Had the Legislature intended a broad meaning to apply to the term "police officer," there would have been no need to specify the statute's application to, *inter alia*, university police officers, sheriff's deputies, and federal conservation officers. See *People v Jahner*, 433 Mich 490, 500 n 3; 446 NW2d 151 (1989) (holding that a "consistent principle of statutory construction is that the express mention in a statute of one thing implies the exclusion of other similar things (expressio unius est exclusio alterius)"); see also *People v Malik*, 70 Mich App 133, 136; 245 NW2d 434 (1976). That the Legislature pointedly did not include reserve police officers indicates that the omission was intentional. See *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) (holding that "provisions not included in a statute by the Legislature should not be included by the courts"); see also *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003) (holding that this

Court should assume that omissions by the Legislature are intentional). Thus, by its terms, the statute does not apply to the failure to obey the order of a reserve police officer.[3]

The cases relied on by the prosecution are inapposite. In *People v McRae*, 469 Mich 704, 710-715; 678 NW2d 425 (2004), the Supreme Court held that a reserve police officer was a state actor for Sixth Amendment purposes. The case involved the application of constitutional standards. There is no basis to conclude that because a reserve police officer has been held to be a state actor under certain circumstances that he or she is also a police officer for purposes of the resisting and obstructing statute. Indeed, a completely private citizen may be held to be a state actor for Fourth Amendment purposes. See *United States v Price*, 383 US 787, 794 n 7; 88 S Ct 1152; 16 L Ed 2d 267 (1966). The term "state action" is broad and of no

[3] The dissent asserts that the Legislature's decision not to enumerate reserve officers along with the many other enumerated categories of officers is of "no significance" and that we should therefore base our decision on the fact that a lay dictionary defines "police force" as a "body of trained officers . . . ." In our view, this case does not require resort to a lay dictionary, and certainly does not require definition of terms other than those used in the statute. Moreover, the dissent's reliance on the dictionary's use of the general term "trained officers" is belied by the fact that, by statute, the degree of training required to become a reserve police officer is far less than that required to become a "regularly employed" police officer, see MCL 28.602(*l*)(*i*), and may vary from one municipality to another. We also decline to adopt the dissent's view that the difference between police officers and reserve officers "depends not on the nature of their service . . . but on the nature of their schedule." The dissent cites no law in support of this conclusion, and it is factually incorrect because, at least in the department in question, a reserve officer may not exercise any authority unless accompanied by a certified, full-time police officer. Finally, we reject the dissent's suggestion that this analysis would differ depending on whether a county or municipality has separate police and fire departments or uses a unified public safety department.

consequence in this case; for example, a public university and its employees are generally state actors, but no one could argue that by virtue of that legal classification, they are also police officers for purposes of the crime of resisting and obstructing.

In *Bitterman v Village of Oakley*, 309 Mich App 53; 868 NW2d 642 (2015), this Court considered whether information concerning reserve police officers fell within the law enforcement exception to disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We reject the prosecution's reliance on *Bitterman* because the phrase used in MCL 15.243(1)(s)(*viii*), "law enforcement officer, agent, or informant," is undoubtedly broader than the term "police officer." Indeed, as this Court opined, reserve police officers likely fit within the FOIA phrase.[4] *Bitterman*, 309 Mich App at 71-72. The term "police officer" in the resisting and obstructing statute is markedly narrower. If the Legislature had intended "police officer," as used in the statute, to be read so broadly, it would not have needed to include a lengthy list of law enforcement professionals and other occupations like firefighters, etc., to whom the law applies, notably omitting reserve police officers.

The prosecution and the dissent make reasonable policy arguments in support of their view that the failure to obey a properly supervised reserve police officer should result in some level of criminal liability. However, the decision whether to criminalize such actions, and if so, what sanctions to impose for engag-

[4] The *Bitterman* Court did not decide "whether [police] reservists should be considered 'law enforcement officers' for the purpose of a FOIA exemption," because there was no evidence in the record of the reservists' "power or duties relating to law enforcement or preserving the peace . . . ." *Bitterman*, 309 Mich App at 72.

ing in such conduct, is a matter reserved for the Legislature. See *People v Ayers*, 213 Mich App 708, 716; 540 NW2d 791 (1995) ("[T]he power to define crime and fix punishment is wholly legislative . . . .").

Affirmed.

M. J. KELLY, J., concurred with SHAPIRO, J.

SAWYER, P.J. (*dissenting*). I respectfully dissent.

I disagree with the majority's conclusion that Police Officer Douglas Roberts, a reserve officer with the city of Brighton, is not, in fact, a police officer for purposes of MCL 750.81d. The majority bases its conclusion on the fact that MCL 750.81d does not specifically list the job title "reserve police officer" in its definition of "person" under the statute. I find this reasoning unpersuasive.

MCL 750.81d(1) establishes as a two-year felony the following:

> Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

Subsections (2), (3), and (4) establish greater penalties depending on the level of injury caused to the "person." Furthermore, MCL 750.81d(7)(b) defines "person" as any of the following:

> (*i*) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

(*ii*) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(*iii*) A conservation officer of the department of natural resources or the department of environmental quality.

(*iv*) A conservation officer of the United States department of the interior.

(*v*) A sheriff or deputy sheriff.

(*vi*) A constable.

(*vii*) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.

(*viii*) A firefighter.

(*ix*) Any emergency medical service personnel described in . . . MCL 333.20950.

(*x*) An individual engaged in a search and rescue operation as that term is defined in section 50c.

The majority finds great significance in the fact that the term "reserve police officer" is not included in this list. I find no significance in that fact. The majority argues that because this list explicitly includes individuals in a number of categories that might implicitly be considered police officers, the Legislature must have intended to exclude other categories that are not explicitly mentioned. I find this reasoning to be flawed.

The majority's reasoning is correct only if we start with the presumption that the Legislature has implicitly reached the same conclusion that the majority has reached—that a reserve police officer is not, in fact, a police officer. That is, the Legislature would have explicitly included reserve police officers in its listing only (1) if the Legislature did not already consider

reserve police officers to be "police officer[s] of this state or of a political subdivision" under MCL 750.81d(7)(b)(*i*), or (2) if the Legislature wanted to explicitly *exclude* reserve officers from the definition of "person" in MCL 750.81d(7)(b). But there is no evidence in the text of the statute suggesting that the Legislature views a reserve police officer as anything other than a police officer. Nor is there any indication that the Legislature intended to exclude reserve officers from the definition of "person."

Next, it should not be overlooked that the statute, while providing an extensive definition of "person," does not, however, provide a definition of "police officer." Looking to *Merriam-Webster's Collegiate Dictionary* (11th ed), "police officer" is defined as "a member of a police force[.]" And "police force" is defined as "a body of trained officers entrusted by a government with maintenance of public peace and order, enforcement of laws, and prevention and detection of crime." Thus, we need to look at whether Officer Roberts is a "trained officer" entrusted by the city of Brighton with the "maintenance of public peace and order, enforcement of laws, and prevention and detection of crime."

Officer Roberts testified that he attended a 16-week police academy, that he was sworn as an officer for the city of Brighton, that the oath included the obligation to uphold the laws of the city of Brighton and the state of Michigan, and that he was issued a uniform and a weapon. He worked full shifts, in a patrol car, along with a full-time officer. With respect to the specific events in this case, Officer Roberts testified that he and the full-time officer with whom he was working were responding to a call for service regarding a fight in progress at a bar. Defendant was identified as the

person causing the problem, and Officer Roberts approached him and asked to speak with him. Defendant responded by running away from Roberts, who identified himself as a police officer and ordered defendant to stop. Defendant only complied after Officer Roberts repeated the command. After defendant stopped, he looked at Officer Roberts, said "fuck you," and then reached behind his back. Concerned that defendant was reaching for a weapon, Officer Roberts drew his own weapon and ordered defendant to the ground. Defendant complied, and with the assistance of two other officers who had arrived at the scene, defendant was taken into custody. I would suggest that these facts establish that Officer Roberts is a trained officer who has been entrusted by the city of Brighton and its police chief with the "maintenance of public peace and order, enforcement of laws, and prevention and detection of crime."

Moreover, I would note that this dictionary definition of "police officer," and its application to reserve officers, finds some support in our Legislature's language, albeit in a different statute. While I can find no use of the term "reserve police officer" in the statutes of this state, at the time of the events in this case, the concealed pistol license statute defined the terms "reserve peace officer" and "reserve officer" to mean

> an individual authorized on a voluntary or irregular basis by a duly authorized police agency of this state or a political subdivision of this state to act as a law enforcement officer, who is responsible for the preservation of the peace, the prevention and detection of crime, and the enforcement of the general criminal laws of this state, and who is otherwise eligible to possess a firearm under this act. [MCL 28.421(1)(g).]

In addition to using a definition similar to the dictionary definitions of "police officer" and "police force," there is another aspect I find compelling—the reference in MCL 28.421(1) to a reserve officer serving on a "voluntary or irregular basis." The distinction between a police officer and a reserve police officer depends not on the nature of their service to the city, but on the nature of their schedule. Both are police officers—that is, both have a duty to preserve the peace, prevent and detect crime, and enforce the criminal laws of this state. The distinction is that a reserve officer does so on an irregular basis. Or, as Officer Roberts testified in this case, he works two or three shifts a month, filling in for officers who are on vacation or have called in sick. That is, unlike a regular, full-time officer, he does not have a regular schedule. But I see nothing in MCL 750.81d that draws a distinction based on whether an officer performs his or her duties according to a regular schedule.

Finally, I would note that if we were to follow the majority's rationale that all categories of "persons" must be explicitly listed in the statute, those "persons" whose job titles are different than simply "police officer" would be necessarily excluded. For example, a number of jurisdictions utilize "public safety" departments rather than police departments. Yet, MCL 750.81d(7)(b) does not include "public safety officers" in its list. I doubt that the Legislature intended to exclude them from the coverage of the statute. Rather, I believe the Legislature presumed that public safety officers, like reserve police officers, fall within the general category of "police officers" because public safety officers are also charged with preserving the peace, preventing and detecting crime, and enforcing the law.

For these reasons, I conclude that Officer Roberts is a police officer of a political subdivision of this state, namely the city of Brighton. Accordingly, defendant could be found guilty under MCL 750.81d if he resisted or obstructed Officer Roberts in the performance of his duties.

I would reverse the lower courts and direct the district court to bind defendant over for trial if it finds that there is otherwise sufficient evidence to do so.

DOE v BOYLE

Docket No. 320102. Submitted March 3, 2015, at Lansing. Decided September 22, 2015, at 9:00 a.m.

John Doe, a minor, through his mother and next friend, brought an action in the Ingham Circuit Court against Renee Boyle, Michael Hand, the state of Michigan, the Department of Human Services (DHS), and the Department of Human Services of Wexford-Missaukee Counties. The case arose after Hand, also a minor at the time, sexually assaulted Doe. Hand was a ward of the state and was living with Boyle, a foster-care provider. The government defendants were dismissed from the action without prejudice. Boyle moved for the appointment of a guardian ad litem for Hand in accordance with MCR 2.201(E)(1)(c). The court entered an order appointing Thomas Woods as Hand's guardian ad litem. Doe then filed a separate action in the Ingham Circuit Court against Citizens Insurance Company of America, Hand, and Boyle, seeking a declaration that Citizens had a duty to defend and indemnify Hand and Boyle in this action. Citizens moved for summary disposition, which the court, Joyce Draganchuk, J., granted. Doe appealed, and the Court of Appeals affirmed. *Doe v Citizens Ins Co of America*, 287 Mich App 585 (2010). Boyle then filed for bankruptcy, resulting in a stay of this action until her discharge from bankruptcy in December 2009. In July 2010, Woods, relying on MCR 3.916(D), moved for payment of his fees and costs. The court, Rosemarie E. Aqualina, J., ruled that Doe was responsible for paying Woods's costs, but not his legal fees. Both Doe and Woods moved for reconsideration. The court denied the motions, but then, one week later, set aside that order, stating that it had been improperly entered without affording Doe's attorneys an opportunity to be heard. Following a hearing, the court granted Doe's motion for reconsideration, ruling that Woods was not entitled to any compensation. Woods was discharged from his duties as Hand's guardian ad litem on June 24, 2011, after Hand reached the age of majority. On July 19, 2011, the court entered a consent judgment against Hand. On July 22, 2011, the court entered another order, purporting to dismiss plaintiff's claims against Hand. In August 2011, Woods appealed. Doe moved to dismiss the claim of appeal. The Court of Appeals

granted the motion, concluding that the circuit court's July 22, 2011 order was not a final order and even if the July 19, 2011 order were a final order, Woods's claim of appeal was not timely filed from that judgment. *Doe v Boyle*, unpublished order of the Court of Appeals, entered November 2, 2011 (Docket No. 305627). In January 2012, Boyle moved for summary disposition, asserting that Doe's claims against her were barred by her bankruptcy discharge. Woods separately moved for a final order closing the case. The circuit court ruled that Boyle had already been dismissed from the case and denied Woods's motion for entry of a final order. Woods filed an application for leave to appeal, which the Court of Appeals granted. The Court of Appeals ultimately reversed the circuit court's denial of Woods's motion for entry of a final order closing the case and remanded the case for entry of a final order. *Doe v Boyle*, unpublished opinion of the Court of Appeals, issued December 10, 2013 (Docket No. 310725). On remand, the parties stipulated entry of a final judgment dismissing all remaining claims and closing the case. Woods appealed, seeking to reverse the circuit court's decision denying his motion for costs and fees.

The Court of Appeals *held*:

Under MCL 600.2415 and MCR 2.201(E)(1)(c), a person who defends a suit as a guardian ad litem on behalf of a minor is not responsible for the costs of the action. Woods, therefore, was entitled to receive his costs from another party. His costs included the attorney fees he incurred as guardian ad litem. MCR 2.201(E)(3)(a) contemplates that a guardian ad litem will be awarded his or her costs and expenses. The term "expenses" encompasses reasonable payment for legal services because, as guardian ad litem, Woods expended time and labor in order to provide legal services to Hand. Therefore, the circuit court abused its discretion when it denied Woods's motion for fees and costs. Under MCL 400.203, DHS was responsible for Hand's care. Accordingly, it was responsible for bearing the expenses related to Hand's defense. The fact that the government defendants were dismissed from the case did not negate the fact that Hand was a ward of the state, and DHS remained responsible for his care. Therefore, DHS was responsible for payment of Woods's costs and expenses. Woods's motion for payment was timely filed. MCR 2.625(f), which sets forth a 28-day time limit for seeking taxable costs, did not apply because Woods requested payment before a final judgment was entered and there were no other applicable time limits on a guardian ad litem's request for attorney fees and costs. Finally, DHS's argument that it did not have notice of

Woods's appointment was unpersuasive given the facts of the case. Accordingly, the fact that the circuit court did not send a notice to DHS when Woods was appointed as Hand's guardian ad litem did not preclude payment. DHS was responsible for payment of the costs and attorney fees that Woods incurred as guardian ad litem for Hand.

Reversed and remanded for a determination of the costs and expenses that Woods incurred as guardian ad litem for Hand.

ATTORNEY FEES — GUARDIAN AD LITEM — WARDS OF THE STATE — RESPONSIBILITY FOR PAYMENT OF COSTS.

Under MCL 600.2415 and MCR 2.201(E)(1)(c), a person who defends a suit as a guardian ad litem on behalf of a minor is not responsible for the costs of the action; under MCL 400.203, the Department of Human Services is responsible for the care of wards of the state; that responsibility includes liability for costs and expenses related to the legal defense of a ward by a guardian ad litem; a guardian ad litem's costs and expenses include attorney fees incurred as guardian ad litem.

Mark Granzotto, PC (by *Mark Granzotto*), *The Keane Law Firm, PC* (by *Christopher J. Keane*), and *Robert Harrison & Associates PLC* (by *Robert S. Harrison*) for John Doe, Christopher J. Keane, and Robert S. Harrison.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *William R. Morris*, Assistant Attorney General, for the Department of Human Services.

Allan Falk, PC (by *Allan Falk*), and *Cummins Woods PC* (by *Thomas E. Woods*), for Thomas E. Woods.

Before: JANSEN, P.J., and METER and BECKERING, JJ.

PER CURIAM. Appellant, Thomas Woods (Woods), appeals as of right following the circuit court's entry of final judgment. In particular, Woods challenges the

circuit court's earlier order denying his request to be compensated for services rendered as a court-appointed guardian ad litem. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On July 14, 2006, John Doe (Doe), a 5-year-old minor, was at the beach in Traverse City, Michigan. Defendant Michael Hand (Hand), a 13-year-old minor, was also at the beach. Hand asked Doe to accompany him to a public restroom. While inside the public restroom, Hand sexually assaulted Doe. At the time of the incident, Hand was a ward of the state of Michigan and was living with defendant Renee Boyle (Boyle), a foster-care provider. The parental rights of Hand's natural parents had been previously terminated.

Doe, by his mother as next friend (plaintiff), sued Hand, Boyle, the state of Michigan, the Michigan Department of Human Services (DHS),[1] and DHS of Wexford-Missaukee Counties in the Ingham Circuit Court. The complaint was filed on July 6, 2007. To proceed with her claims against minor child Hand, plaintiff filed an ex parte motion for the appointment of a guardian ad litem for Hand under MCR 2.201(E)(1)(c).

On October 12, 2007, the circuit court entered an order dismissing defendants DHS, DHS of Wexford-Missaukee Counties, and the state of Michigan from this action without prejudice.[2] A hearing on plaintiff's

[1] DHS is now known as the Department of Health and Human Services. See Executive Order No. 2015-4.

[2] Plaintiff later sued the state, DHS, and DHS of Wexford-Missaukee Counties in the Court of Claims, where her causes of action were dismissed on the grounds of governmental immunity and failure to state a claim on which relief could be granted. This Court affirmed. *Doe v*

motion to appoint a guardian ad litem for Hand was held on January 23, 2008. The attorney for plaintiff and Doe noted that Hand needed a next friend or guardian ad litem because he was a minor. The circuit judge remarked, "I don't know who to suggest to appoint. I don't know anybody that does this sort of thing. We'll find you somebody." Woods happened to be present in the courtroom for an unrelated matter. The circuit judge apparently knew Woods and asked him whether he would be willing to serve as Hand's guardian ad litem. Woods agreed. The court entered an order appointing Woods as guardian ad litem under MCR 2.201(E)(1)(c). Woods entered his appearance as "Guardian Ad Litem and attorney[]" for Hand. Woods then filed answers to plaintiff's first and second amended complaints on behalf of Hand.

Meanwhile, plaintiff filed a separate action for declaratory relief. In this separate action, plaintiff sought a declaration that Boyle's provider of homeowner's insurance, Citizens Insurance Company (Citizens), was obligated to defend Boyle and indemnify her for any liability that she might incur as a result of plaintiff's claims. Citizens moved for summary disposition. Woods appeared in the declaratory-judgment action as guardian ad litem for Hand, siding with plaintiff and arguing for insurance coverage. Woods concurred in plaintiff's opposition to Citizen's motion for summary disposition. The circuit court ultimately granted summary disposition in favor of Citizens because there was a sexual-molestation exclusion in Boyle's insurance policy, and this Court affirmed. *Doe v Citizens Ins Co of America*, 287 Mich App 585, 586-588; 792 NW2d 80 (2010). Boyle subsequently filed for bankruptcy, result-

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Michigan, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2009 (Docket No. 285274).

ing in an automatic stay of this action until Boyle's discharge from bankruptcy in December 2009.

On July 23, 2010, after several months with no additional action by plaintiff's attorneys, Woods filed a motion for fees and costs. Relying on MCR 3.916(D), Woods asserted that he was entitled to recover his expenses and costs, including attorney fees, from DHS in the amount of $20,720.79. Woods attached detailed billing statements to his motion. DHS opposed the motion, arguing that MCR 3.916(D) applied only in juvenile-delinquency and child-protective proceedings, and not in general tort litigation such as the instant case. DHS contended that the superintendent of the Michigan Children's Institute (MCI)—and not Woods—served as Hand's guardian because Hand was a ward of the state. Alternatively, DHS argued that it could not be held responsible for paying Woods's fees because (1) it was dismissed from the lawsuit more than two years earlier, (2) it never received notice of Woods's appointment as guardian ad litem, (3) Woods was not appointed as Hand's attorney, but merely as Hand's guardian ad litem, and (4) Woods waited too long to file his motion for fees.

In reply, Woods pointed to the language of MCR 2.201(E)(1)(c), which provides, in part, that "[i]f the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, *who is not responsible for the costs of the action* unless, by reason of personal misconduct, he or she is specifically charged costs by the court." (Emphasis added.) Woods asserted that this language entitled him, as Hand's guardian ad litem, to recover his costs and expenses. According to Woods, it was disingenuous for DHS to argue that it never received notice of his

appointment because DHS was present at the time and had actual knowledge of his appointment as guardian ad litem. Woods also pointed out that, because no one had been nominated to serve as Hand's guardian ad litem within 21 days after service of process, the circuit court was entitled to sua sponte appoint a guardian ad litem of its own choice, no nomination was necessary, and the parties were not entitled to advance notice. MCR 2.201(E)(2)(a)(iii).

Woods acknowledged that the Superintendent of MCI serves as "guardian" for wards of the state under MCL 400.203(1). But he argued that the term "guardian" in MCL 400.203(1) and MCL 712A.18 is separate and distinct from the term "guardian ad litem" in MCR 2.201(E). As for DHS's contention that Woods's motion was untimely, Woods argued that there was no court rule or statute limiting the amount of time in which he was required to request his fees and costs. Woods requested an additional $7,246.12 in attorney fees for prosecuting the motion for fees and costs.

On January 5, 2011, the circuit court issued a written opinion and order denying Woods's motion seeking fees and costs from DHS. Instead, the circuit court ruled that plaintiff was responsible for paying Woods's costs as an element of taxable costs, but plaintiff was not responsible for Woods's legal fees. Woods moved for reconsideration, arguing that he was entitled to attorney fees because his appointment as guardian ad litem had at all times contemplated the rendering of associated legal services for Hand. Woods also argued that if he could not recover his costs and expenses from DHS or plaintiff, then he would be left without a remedy. He argued that it would be contrary to Michigan law to require a court-appointed guardian ad litem to serve without compensation. Plaintiff's

attorneys separately moved for reconsideration of the January 5, 2011 order.

On March 22, 2011, the circuit court denied the motions, reiterating that DHS was not responsible for the payment of Woods's fees and observing that neither Woods nor plaintiff's attorneys had shown any palpable error warranting reconsideration. About a week later, the circuit court stated that it had erroneously denied the motion of plaintiff's attorneys for reconsideration without affording them an opportunity to be heard. The court set aside its order of March 22, 2011, and scheduled a hearing on the matter. Woods filed a motion requesting that he be discharged from any further duties as guardian ad litem and released from the case. He submitted a proposed order to this effect under the 7-day rule of MCR 2.602(B)(3). Plaintiff objected to the proposed order, arguing that Woods should be required to continue as Hand's guardian ad litem. Following a hearing, the circuit court granted the motion of plaintiff's attorneys for reconsideration of the March 22, 2011 order. On May 27, 2011, the court issued an order to this effect, providing that Woods was not entitled to any compensation whatsoever, and clarifying that Woods's motion for fees and costs was being denied in full.

On May 18, 2011, plaintiff moved for summary disposition with respect to her remaining intentional tort claims against Hand. Woods continued as Hand's guardian ad litem, given that he was not relieved of his duties by court order, and filed a response to plaintiff's motion for summary disposition on June 13, 2011. On June 24, 2011, the parties and court signed a stipulated order discharging Woods from the case and releasing him from any further obligations as Hand's guardian ad litem since Hand had reached the age of

majority. On July 19, 2011, the circuit court entered a consent judgment against Hand in the amount of $1,000,000. Hand stipulated to the entry of the judgment. Then, on July 22, 2011, the court curiously entered an order dismissing plaintiff's claims against Hand with prejudice and without costs to either party.

On July 27, 2011, Woods entered an appearance as the former guardian ad litem for Hand. On August 12, 2011, Woods filed a claim of appeal in this Court, challenging the circuit court's denial of his request for fees and costs. Plaintiff moved to dismiss Woods's claim of appeal, arguing that the circuit court's order of July 22, 2011, was not a final order appealable by right. On November 2, 2011, this Court dismissed Woods's claim of appeal for lack of jurisdiction. *Doe v Boyle*, unpublished order of the Court of Appeals, entered November 2, 2011 (Docket No. 305627). This Court noted that, assuming the July 19, 2011 order was the final order, Woods had not appealed it within 21 days as required by MCR 7.204(A)(1)(a). This Court denied Woods's motion for reconsideration on December 21, 2011. *Doe v Boyle*, unpublished order of the Court of Appeals, entered December 21, 2011 (Docket No. 305627).

In January 2012, Boyle filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims against her should be dismissed because they were barred by her bankruptcy discharge. Plaintiff argued that the motion was unnecessary because her claims against Boyle had already been administratively dismissed as a result of the bankruptcy proceedings. Plaintiff also argued that her attorneys had not received timely notice of Boyle's motion. Woods filed a brief, noting that plaintiff continued to maintain that Boyle was a party to the litigation even after the

bankruptcy discharge. Woods argued that plaintiff should be estopped from making the new argument that her claims against Boyle had already been administratively dismissed. Woods also filed his own motion on March 26, 2012, requesting that the circuit court enter a final order closing the case. At oral argument, on April 4, 2012, the circuit court stated that Boyle had already been dismissed from the case at the time of her discharge from bankruptcy and remarked that Woods was seeking the entry of a final order so that he could "have a little crack at the Court of Appeals." On May 22, 2012, the court denied Woods's motion for the entry of a final order closing the case.

On June 12, 2012, Woods filed an application for leave to appeal in this Court. This Court granted the application on March 28, 2013. *Doe v Boyle*, unpublished order of the Court of Appeals, entered March 28, 2013 (Docket No. 310725). After plenary review, this Court reversed the circuit court's denial of Woods's motion for the entry of a final order closing the case. *Doe v Boyle*, unpublished opinion per curiam of the Court of Appeals, issued December 10, 2013 (Docket No. 310725). This Court ruled that although Boyle's discharge from bankruptcy had rendered unenforceable any attempt to collect from her, it had not actually extinguished the pending state-court action. *Id*. at 4. This Court continued, "The matter against Boyle having not been adjudicated through a written order of the trial court, the trial court erred by finding that the instant case was closed and in refusing to enter a written order dismissing defendant Boyle from the case." *Id*. This Court remanded the matter to the circuit court for entry of a final order closing the case. *Id*. at 5. On remand, the parties stipulated entry of a final judgment dismissing all remaining claims and

closing the case. Woods timely filed his claim of appeal in this Court on January 29, 2014.[3]

II. STANDARD OF REVIEW

We review a trial court's decision regarding whether to grant an award of attorney fees and costs for an abuse of discretion. See *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. We review de novo the proper application and interpretation of a court rule. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 532; 866 NW2d 817 (2014). Similarly, we review de novo issues regarding the proper interpretation and application of a statute. *Detroit Pub Sch v Conn*, 308 Mich App 234, 246; 863 NW2d 373 (2014).

III. GUARDIAN AD LITEM COSTS AND EXPENSES

Woods argues that he was entitled to compensation for the services he rendered as guardian ad litem and that the circuit court abused its discretion when it determined that DHS was not required to pay for his costs and expenses. We agree.

Woods acted as Hand's guardian ad litem in the circuit court. *Black's Law Dictionary* (10th ed) defines the term "guardian ad litem" as a "guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." 3 Michigan Pleading & Practice (2d ed, 2015 revised volume),

[3] Woods identified plaintiff's former attorneys, Christopher J. Keane and Robert S. Harrison, as appellees in addition to plaintiff and the government defendants.

§ 28:1, p 4, defines the term "guardian ad litem" as "a guardian appointed to represent a ward in legal proceedings in which the ward is a party defendant." Woods was appointed guardian ad litem by the court pursuant to MCR 2.201(E)(2)(a), which provides:

> Appointment of a next friend or guardian ad litem shall be made by the court as follows:
>
> (i) if the party is a minor 14 years of age or older, on the minor's nomination, accompanied by a written consent of the person to be appointed;
>
> (ii) if the party is a minor under 14 years of age or an incompetent person, on the nomination of the party's next of kin or of another relative or friend the court deems suitable, accompanied by a written consent of the person to be appointed; or
>
> (iii) if a nomination is not made or approved within 21 days after service of process, on motion of the court or of a party.

Because Woods was appointed to act as Hand's guardian ad litem, he was not responsible for the costs of the lawsuit. MCL 600.2415 provides:

> Any person who brings an action as next of friend for an infant, or a person who is insane or otherwise mentally incompetent, shall be responsible for the costs of the suit. However, *no person who defends a suit as guardian ad litem of an infant or otherwise incompetent person shall be responsible for the costs of the suit* unless specifically charged by the court for some personal misconduct in the case. [Emphasis added.]

Similarly, MCR 2.201(E)(1)(c) provides:

> If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, *who is not responsible for the costs of the action* unless, by reason of personal misconduct, he or she

> is specifically charged costs by the court. It is unnecessary to appoint a representative for a minor accused of a civil infraction. [Emphasis added.]

It is clear that Woods was not responsible for the costs of the case because MCL 600.2415 and MCR 2.201(E)(1)(c) state that a guardian ad litem is not responsible for the costs of the action. As further support for the fact that a guardian ad litem is not responsible for his or her costs, MCR 2.201(E)(3)(a) adds:

> *Except for costs and expenses awarded to the next friend or guardian ad litem* or the represented party, a person appointed under this subrule may not receive money or property belonging to the minor or incompetent party or awarded to that party in the action, unless he or she gives security as the court directs. [Emphasis added.]

MCR 2.201(E)(3)(a) contemplates that a guardian ad litem will receive an award for his or her costs and expenses, which further indicates that Woods was not responsible for his own costs and expenses. Woods, therefore, was entitled to receive his costs and expenses from another party. See MCL 600.2415; MCR 2.201(E)(1)(c) and (3)(a).

In addition, Woods was entitled to receive attorney fees as part of the costs and expenses he incurred as guardian ad litem. The phrase "costs and expenses" is not defined in MCR 2.201(E)(3)(a). We give an undefined term its ordinary meaning and consult a dictionary to determine the ordinary meaning, if necessary. See *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The term "cost" is defined in *Black's Law Dictionary* (10th ed) as "[t]he amount paid or charged for something; price or expenditure." *Black's Law Dictionary* (10th ed) defines "expense" as "[a]n expenditure of money, time, labor, or resources to accomplish a

result; [especially], a business expenditure chargeable against revenue for a specific period." The term "expense" encompasses reasonable payment for the legal services rendered by Woods as guardian ad litem because Woods expended time and labor in order to provide legal services to Hand. See MCR 2.201(E)(3)(a).[4] Therefore, Woods is entitled to payment for any costs that he incurred and for the legal services he rendered as guardian ad litem. Accordingly, the circuit court abused its discretion when it denied Woods's motion for fees and costs after reconsideration of the issue.

DHS is responsible for payment of Woods's expenses and costs because Hand was a ward of the state of Michigan. MCL 600.2415 and MCR 2.201(E) do not clarify which party is responsible for payment of the costs and expenses of a guardian ad litem.[5] However, the fact that DHS is responsible for payment of Woods's expenses and costs is apparent from the fact

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[4] Thus, the award of attorney fees is consistent with the "American rule" regarding attorney fees, which provides that attorney fees are generally not recoverable unless a statute, court rule, or the common law provides an exception. See *Silich v Rongers*, 302 Mich App 137, 147-148; 840 NW2d 1 (2013).

[5] MCR 2.201(E)(1)(b) and MCL 600.2415 provide that the person who appears as next friend on behalf of the plaintiff is responsible for the "costs" of the suit. However, as explained in further detail later in this opinion, Woods did not present a bill of taxable costs after the final judgment in the case. See MCL 600.2405(6) (providing that attorney fees may be taxed as costs when authorized); MCL 600.2415; MCR 2.201(E)(1)(b); MCR 2.625(F). Instead, Woods filed a motion for fees and costs before either party prevailed in the case. Additionally, the court rule does not specify that a next friend is responsible for the services of a guardian ad litem for the opposing party. Furthermore, a next friend is not responsible for *all* the costs and expenses in the action given that MCR 2.201(E)(3)(a) contemplates that costs and expenses may be awarded *to* a next friend. Therefore, plaintiff was not liable to pay for Woods's services as an element of taxable costs.

that DHS was accountable for Hand's care. MCL 400.203(1) provides, in part:

> A child under 17 years of age, provision for whose support and education has been made under regulations of the department, may be admitted to the Michigan children's institute by commitment to the department. All children committed to the Michigan children's institute shall be considered committed to the department and shall be subject to review by the juvenile division of the probate court under . . . MCL 712A.1 to 712A.32. *The superintendent of the institute shall represent the state as guardian of each child committed beginning with the day the child is admitted and continuing until the child is 19, unless the superintendent or the department discharges the child sooner* as provided in [MCL 400.208 or MCL 400.209] or if the child is at least 18 years of age but less than 21 years of age and is participating in extended foster care services as described in section 11 of the young adult voluntary foster care act. [Emphasis added.]

MCL 400.203(2) adds:

> The superintendent of the institute has the power to make decisions on behalf of a child committed to the institute. The attorney general or his or her representative shall represent the Michigan children's institute superintendent in any court proceeding in which the superintendent considers such representation necessary to carry out his or her duties under this act.

MCL 400.203(2) clarifies that the superintendent is responsible for the decision-making on behalf of the child from the time the child is admitted until the child turns 19 years old. Therefore, because the department was responsible for making decisions on behalf of Hand, DHS is the proper party for bearing the expenses related to Hand's defense. The fact that the state of Michigan, DHS, and DHS of Wexford-Missaukee Counties were dismissed from the case does not negate the fact that Hand was a ward of the state,

and DHS remained responsible for Hand's care. Therefore, DHS is also responsible for payment of Woods's costs and expenses.

A similar outcome is required in child-protective and delinquency proceedings. MCR 3.916(D) provides, "The court may assess the cost of providing a guardian ad litem against the party *or a person responsible for the support of the party*, and may enforce the order of reimbursement as provided by law." (Emphasis added.) MCR 3.916(D) applies to delinquency and child-protective proceedings within the family division of the circuit court. MCR 3.901(B)(1); MCR 3.903(A)(4). Accordingly, in the context of a delinquency or child-protective proceeding, it is clear that the family division of the circuit court may order that the person responsible for the support of the party pay the costs of providing a guardian ad litem. This case presents an analogous situation because a guardian ad litem was appointed for a ward of the state. Although Woods was appointed in a civil case, rather than in a child-protective or delinquency proceeding, the situation is comparable given that Hand was a ward of the state and required a guardian ad litem in order for the case to proceed. Thus, a similar outcome is warranted. In this case, the person responsible for Hand was the state. See MCL 400.203. Therefore, we conclude that DHS is the responsible party for payment of Woods's fees and expenses.

Finally, the fact that the superintendent was Hand's guardian does not negate the fact that Woods acted as guardian ad litem. Woods argues that the term "guardian" in MCL 400.203(1) and MCL 712A.18 merely signified the responsibility of the superintendent to provide for the needs of the wards entrusted to the superintendent's care. Woods points out, in contrast,

that a "guardian ad litem" appointed under MCR 2.201(E)(1)(c) is charged with the task of representing a defendant minor child in a lawsuit. In short, Woods argues that the terms "guardian" and "guardian ad litem" have different meanings. See *Sheahan v Wayne Circuit Judge*, 42 Mich 69, 70; 3 NW 259 (1879) (describing the difference between a general guardian, who does not represent a minor for purposes of litigation, and a guardian ad litem, who represents the minor in litigation); 3 Michigan Pleading & Practice (2d ed, 2015 revised volume), § 28:4, pp 7-8 (describing the difference between a general guardian and a guardian ad litem). We agree that the two terms have different meanings and that Woods is entitled to compensation for the services he rendered while representing Hand in the lawsuit in spite of the fact that the state had control over Hand's care. For the reasons discussed, the circuit court abused its discretion when it determined that Woods was not entitled to payment and that DHS was not responsible for payment.

IV. TIMING OF REQUEST

The circuit court abused its discretion when it concluded in its opinion that Woods took too long to file his motion for fees and costs. Woods filed his motion six months after this Court issued an opinion regarding the liability of Boyle's insurer. In arguing that Woods was not entitled to costs, DHS relied on MCR 2.625(F)(2), which provides a 28-day time limit for seeking taxable costs. MCR 2.625(F)(2), however, applies only when there is a final judgment in the case. See MCR 2.625(F)(1) and (2) (providing that a trial court may tax costs when it signs the judgment, or the party entitled to taxable costs must seek the taxable costs within 28 days after the judgment was signed or

entry of an order denying postjudgment relief). Woods, though, requested payment for his services under MCR 3.916(D) *before* entry of the final judgment in the case. Woods does not argue that the circuit court entered a final order before he sought his fees and costs. Instead, Woods argues that he was entitled to fees and costs because he acted as guardian ad litem for Hand and he filed his motion before entry of the final judgment. Therefore, the time limit outlined in MCR 2.625(F) does not bar Woods's request. There are no other applicable time limits on a guardian ad litem's request for attorney fees and costs. Therefore, the fact that Woods filed his motion for fees and costs approximately six months after this Court determined that an exclusion in Boyle's insurance policy precluded recovery from Boyle's insurer did not prohibit Woods from requesting fees and costs.

V. NOTICE

The circuit court also abused its discretion when it determined that DHS must receive notice of the appointment of a guardian ad litem. The circuit court failed to cite authority for the proposition that DHS must be notified when a guardian ad litem is appointed. DHS's argument that it did not have notice of Woods's appointment is unpersuasive in light of the fact that Hand was a ward of the state. DHS was on notice that a guardian ad litem would be appointed because Hand did not have a conservator to represent him. See MCR 2.201(E)(1)(c) (providing that a guardian ad litem must be appointed if a minor does not have a conservator). Furthermore, DHS had knowledge of the lawsuit given that it was initially a party to the lawsuit. Additionally, DHS had the ability to examine the court records and files in the case, and Woods's

appearance as lawyer and guardian ad litem for Hand appeared on the circuit court register of actions. See MCR 8.119(D)(1)(c) (providing that the register of actions is a case record); MCR 8.119(H) (providing that case records defined in MCR 8.119(D) are public records and outlining the process for access to public records).[6] Plaintiff also requested a guardian ad litem for Hand under MCR 2.201(E)(1)(c) in its first amended complaint, which was served on DHS. Therefore, the fact that the circuit court did not send a notice to DHS when Woods was appointed as Hand's guardian ad litem does not preclude payment.

VI. CONCLUSION

DHS is responsible for payment of the costs and attorney fees that Woods incurred as guardian ad litem for Hand. We reverse and remand for a determination of the costs and expenses that Woods incurred as guardian ad litem for Hand. We do not retain jurisdiction. As the prevailing party, Woods may tax costs pursuant to MCR 7.219.

JANSEN, P.J., and METER and BECKERING, JJ., concurred.

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[6] We note that, contrary to the argument of the state of Michigan, DHS, and DHS of Wexford-Missaukee Counties, the circuit court has jurisdiction over the issue of Woods's fees and expenses. See MCR 2.201(E)(1) and (2)(a); *Truitt v Battle Creek*, 208 Mich 618, 622; 175 NW2d 578 (1920) (noting that the issue of the compensation and expenses of a guardian ad litem are determined by the trial court).

PEOPLE v CORBIN

Docket No. 319122. Submitted May 14, 2015, at Traverse City. Decided September 22, 2015, at 9:05 a.m.

Jeffry Lewis Corbin pleaded guilty in the Leelanau Circuit Court to second-degree criminal sexual conduct (CSC-II) involving two sons of one of defendant's friends, referred to pseudonymously as Austin and Shane. The CSC-II charge involving Austin was dismissed because the statutory period of limitations had expired on the charge, but at defendant's plea hearing, in addition to pleading guilty to the CSC-II charges involving Shane, defendant also admitted to the misconduct with Austin. The court, Thomas G. Power, J., sentenced defendant to 9 to 15 years of imprisonment and conducted a hearing to determine the amount of restitution owed to Austin and Shane. The court's restitution order included the estimated future costs of therapy, psychiatric care, and medication, lost wages, and the amount of money each brother had already paid for treatment. The Court of Appeals denied for lack of merit defendant's delayed application to appeal the trial court's order of restitution. Defendant sought leave to appeal in the Michigan Supreme Court. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 497 Mich 886 (2014).

The Court of Appeals *held*:

1. The trial court erred when it awarded restitution to Austin because the charge related to defendant's misconduct with Austin had been dismissed. Restitution is appropriate only when a victim was harmed by the course of a defendant's conduct when that conduct gives rise to a conviction. In this case, the CSC charge against defendant for his misconduct involving Austin was dismissed because the statutory period of limitations had expired. Therefore, defendant was no longer charged with CSC involving Austin, and the trial court was prohibited from ordering defendant to pay restitution to a victim not harmed by conduct giving rise to a conviction. That is, a trial

court may not order restitution to a victim of a defendant's uncharged conduct.

2. The trial court abused its discretion when it ordered defendant to pay Shane an amount of restitution based on estimated costs of treatment for a typical individual, not on costs estimated on the basis of Shane's demonstrated need for treatment, the type of treatment needed, and the length of time treatment should continue. The statutory language requires that restitution be reasonably determined for losses reasonably expected to be incurred. The trial court ordered a restitution amount based on research indicating the average treatment expectations for a typical individual. The prosecution failed to produce evidence to show that Shane himself would require certain modes of treatment for a certain length of time for a certain amount of money. Because the restitution amounts calculated were based on unspecified hourly fees for treatment not tailored to Shane's unique needs, the restitution did not satisfy the statutory requirement that it be for losses reasonably expected to be incurred.

3. The trial court erred by ordering defendant to pay restitution for Shane's lost wages because lost earning capacity is not the same as income loss. The statutory language authorizes restitution for a victim's after-tax income loss when the income loss is a result of the crime. In this case, the trial court adopted Shane's father's assertion that Shane had been offered a job paying $400 a week but that Shane could not accept the position because of the legal proceedings related to this case. Even if lost earning capacity qualified as income loss, the trial court failed to require evidence of the after-tax amount of Shane's income loss, and no evidence suggested that Shane was unable to work during the entire time the court used to calculate his income loss.

4. The Sixth Amendment does not require that a jury determine the amount of restitution a defendant should pay a victim of his or her crime. Judicial fact-finding is permissible when a trial court is deciding on the amount of restitution to order. Whether restitution constitutes a criminal punishment is not dispositive, because an order of restitution does not make more severe the penalty a defendant receives after pleading to or being convicted of a crime. That is, restitution is a restorative remedy that does not increase a defendant's sentence after conviction.

Restitution order vacated; case remanded for further proceedings.

RESTITUTION — PSYCHOLOGICAL INJURIES — STANDARD FOR CALCULATING AMOUNT OF RESTITUTION.

Under the Crime Victim's Rights Act, MCL 780.751 *et seq*., reasonableness is the standard by which a restitution award is to be measured; there is no requirement that the amount of restitution be easily ascertained or measured; rather, a restitution award must represent losses that are reasonably determined and reasonably expected to be incurred as a result of the crime, and the losses must bear some relationship to the individual victim's needs and circumstances; a victim's losses may not be measured solely by referring to an average or typical situation involving similar losses.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Joseph T. Hubbell*, Prosecuting Attorney, for the people.

F. Randall Karfonta and *Michael H. Dettmer* for defendant.

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

GLEICHER, P.J. The prosecution charged that defendant sexually abused two young brothers. Both victims are now adults; we refer to them pseudonymously as Shane and Austin. Defendant pleaded guilty to the charged conduct involving Shane. The prosecutor dismissed a single count involving Austin. The trial court sentenced defendant to prison and ordered him to pay $276,800 in restitution to Austin, and $276,985 to Shane. Defendant challenges only the restitution order.

We conclude that the restitution awards cannot stand. Because defendant's illegal acts involving Austin did not give rise to defendant's convictions, Austin is not entitled to any restitution. Shane's restitution award, too, must be vacated, as the evidence provided no reasonable factual basis for substantial components

of the total. Accordingly, we vacate most of the restitution order and remand for further proceedings.

I

Austin and Shane were born in 1989 and 1991, respectively. They resided in Kansas City with their mother and father until 1992, when their parents separated. Their parents' divorce finalized in 1994, and the brothers moved with their mother to Traverse City. Their father relocated to Belgium a year later and remained overseas until 2000, when he returned to Kansas City.

Defendant and his wife lived in Traverse City and were close friends of the brothers' mother. Shane described defendant as a quasi-father figure. As boys, the brothers frequently visited defendant's home. Defendant repeatedly assaulted them there, and on cross-country skiing trips in Canada, between 1995 and 2005. Shane disclosed the abuse in January 2011. When interviewed by the police, defendant admitted to having engaged in sexual contact with both brothers.

The felony information set forth three counts of second-degree criminal sexual conduct (CSC-II) involving Shane, and one count involving Austin. At defendant's guilty plea hearing, the prosecutor conceded that the statutory period of limitations had run on the allegations concerning Austin and voluntarily dismissed that charge. When tendering his guilty plea, defendant nevertheless admitted to having engaged in criminal sexual conduct with Austin.

The trial court imposed an upward departure sentence of 9 to 15 years' imprisonment and subsequently convened a restitution hearing. At the hearing, the victims' father conceded that he had been physically separated from his sons during an approximately six-

year period, but denied that he had been meaningfully absent from their lives. He detailed the expenditures he attributed to their sexual abuse. The father recounted that he incurred "roughly $4000" in therapy charges for both victims, and provided an "estimate" of the costs incurred for their medications of "about a thousand dollars." Shane had failed his first year of college due to the trauma of the abuse, the father asserted, resulting in a separate financial loss of "[a]pproximately $20,000." Both sons lost income, the father claimed, because the pending court proceedings rendered them unable to accept job offers at two affiliated ice cream shops that would have paid each $400 weekly. The father elucidated: "They were really in no condition to take on a role of management in a time consuming process we were going through at the time with this."

The victims described the psychological trauma caused by the assaults and the difficulties they have endured in trying to lead normal lives. Shane explained that he has been diagnosed with post-traumatic stress disorder (PTSD), which causes flashbacks and nightmares. He agreed with the prosecutor that the PTSD "affected" his ability to be successful in college, and "interfered with" his ability to obtain gainful employment. Austin, too, suffers from PTSD. He completed only one year of college before deciding that he was emotionally unable to continue attending classes.

Beginning in 2011, both victims have engaged in psychological counseling with Mark McGonigle, a licensed clinical social worker in Missouri. McGonigle has an undergraduate degree in psychology from the University of Dallas, a degree in "social welfare" from the University of Kansas, and a master's degree in

"applied spirituality" from the University of San Francisco. Defendant's counsel stipulated to McGonigle's qualifications to testify as an expert witness in "the area of PTSD." McGonigle served as the prosecution's sole witness regarding the victims' need for therapy and the projected costs of their care.

McGonigle characterized PTSD as "an anxiety disorder" that produces "a chronic reaction to traumatic events that kind of creates its own syndrome of emotional, mental and behavioral problems." To qualify for the diagnosis, an individual must "have a significant impairment in functioning both inner [sic] personal, social, occupational or other important areas of functioning." In McGonigle's view, Shane "had both major depression that was recurrent in his life and posttraumatic stress disorder." McGonigle attributed the cause of Shane's PTSD to "the sexual abuse he experienced from [defendant], and that was also a major factor in his depression." Austin shares with Shane the PTSD diagnosis and its cause; McGonigle did not diagnose Austin as suffering from major depression "because he hasn't shown those symptoms."

McGonigle testified that although his contact with Shane had been "somewhat sporadic," they "developed a treatment plan for treatment of PTSD . . . . I was expecting kind of a long course of treatment with possible referral to in-patient intensive therapy as needed." In a written report admitted as evidence during the hearing, McGonigle expressed that the brothers "will likely need therapy for a period of many years and likely intermittently over the course of their lives, especially as they mature into men of marital age." The cost of that therapy on a twice-weekly basis, he elaborated, would depend "on the individual therapist's fee structure, [and] will likely cost approximately

$14,000-18,000 per year." "To be secure," he continued, "and given their young ages, I think they should plan to receive at least 8-10 years of such treatment."

McGonigle explained that the "intensive inpatient treatment" he recommended could occur at a facility such as The Meadows in Arizona, which charges "approximately $42,000" for a stay of four to six weeks. The brothers' projected future "psychiatric care" and medication costs, McGonigle predicted, would range from $3,000 to $5,000 each year. McGonigle's report indicates that Shane had paid $1,785 "[t]o date" for his therapy.[1]

In a bench opinion, the trial court awarded both brothers $15,000 a year in outpatient therapy costs for eight years, totaling $120,000 for each brother. The trial court found that both brothers were also entitled to the costs of inpatient admissions at The Meadows, which the court estimated at $42,000 each. The court adopted McGonigle's cost estimates for medication and psychiatric services of $40,000 for each brother, and further granted each brother $31,200 in lost wages, yielding a total of $275,200 each. The court then added to that sum the amounts already paid for treatment: $1,600 for Austin, and $1,785 for Shane.[2]

Defendant sought delayed leave to appeal the restitution order. This Court denied the application "for

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[1] McGonigle's treatment records, admitted as an exhibit at the restitution hearing, reflect 12 visits with Shane in 2011, and none in 2012. McGonigle testified that he had approximately four sessions with Shane in 2013 that he had not yet documented. Assuming that he had not billed for the 2013 sessions, we calculate that McGonigle charged $148.75 for each session. At a similar rate, $15,000 a year would yield approximately 100 therapy visits.

[2] The trial court's written restitution order states that Shane was awarded $277,985 in restitution. That amount represents a miscalculation of the amount of restitution the court ordered from the bench.

lack of merit in the grounds presented." *People v Corbin*, unpublished order of the Court of Appeals, entered April 25, 2014 (Docket No. 319122). Defendant then sought leave to appeal in the Supreme Court, and moved to add issues for that Court's consideration. The Supreme Court granted the motion to add issues and, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Corbin*, 497 Mich 886 (2014).

II

The William Van Regenmorter Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., mandates that a sentencing court order convicted defendants to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction[.]" MCL 780.766(2). A "victim" is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). Under the CVRA, restitution is available to compensate victims for losses associated with either physical or psychological injury. An order of restitution may compel a defendant to:

> (a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.
>
> * * *
>
> (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime. [MCL 780.766(4).]

Michigan's general restitution statute, MCL 769.1a, defines "victim" in essentially the same fashion, clari-

fying that the term reaches individuals harmed "as a result of the commission of a felony, misdemeanor, or ordinance violation." MCL 769.1a(1)(b). Like the CVRA, the general restitution statute demands that a sentencing court order restitution when appropriate. MCL 769.1a(2). The language differs, however, regarding restitution for the costs of medical or psychological care:

> (4) If a felony, misdemeanor, or ordinance violation results in physical or psychological injury to a victim, the order of restitution may require that the defendant do 1 or more of the following, as applicable:
>
> (a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care. [MCL 769.1a.]

Unlike the CVRA, the general restitution statute permits restitution only for "*actual* medical and related professional services." MCL 769.1a(4)(a) (emphasis added). Both statutes allow a victim to recover "after-tax income loss suffered . . . as a result of" the "crime," MCL 780.766(4)(c), or the "felony," MCL 769.1a(4)(c).

The CVRA provides that the prosecution has the burden of proving by a preponderance of the evidence the amount of the victim's loss. MCL 780.767(4). "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." *People v McKinley*, 496 Mich 410, 421; 852 NW2d 770 (2014). This Court has held that court-ordered restitution is not a substitute for civil damages. *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991). Nor is restitution properly awarded for losses paid by insurance. *People v Dimoski*, 286 Mich App 474, 480-481; 780 NW2d 896 (2009).

"The proper application of . . . statutes authorizing the assessment of restitution at sentencing is a matter of statutory interpretation, which we review de novo." *McKinley*, 496 Mich at 414-415. We review a court's calculation of a restitution amount for an abuse of discretion, *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006), and its factual findings for clear error, *People v Fawaz*, 299 Mich App 55, 64; 829 NW2d 259 (2012). A trial court may abuse its discretion by blurring the distinction between a civil remedy for damages and the criminal penalty of restitution. *People v Orweller*, 197 Mich App 136, 140; 494 NW2d 753 (1992).

III

We first address a question raised in defendant's "motion to add issues," which the Supreme Court granted in the order remanding the case to this Court for consideration as on leave granted. In that motion, defendant adopted the issues presented by the defendant in *McKinley*, 496 Mich at 414, which included that Michigan's statutory restitution scheme cannot withstand constitutional scrutiny because it permits restitution based on uncharged conduct never submitted to a jury. In *McKinley*, the Supreme Court declined to reach this constitutional question, invoking the "venerable rule of constitutional avoidance . . . ." See *id*. at 415-417. Rather, the Court focused on the plain language of MCL 780.766(2), which provides that "full restitution" may be authorized only for "any victim of the defendant's course of conduct *that gives rise to the conviction* . . . ." *Id*. at 419 (quotation marks omitted; omission in original). By consulting a dictionary, the Supreme Court determined that the phrase "gives rise to" means "to produce or cause." *Id*. The Court con-

cluded: "Only crimes for which a defendant is charged 'cause' or 'give rise to' the conviction. Thus, the statute ties 'the defendant's course of conduct' to the convicted offenses and requires a causal link between them." *Id*. In reaching this result, the Court overruled its prior decision in *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997), which had governed the *McKinley* trial court's restitution decision. *McKinley*, 496 Mich at 413, 419.

Given the Supreme Court's order that we consider the issues raised in defendant's motion, we must address whether the trial court appropriately awarded restitution to Austin. Defendant was not convicted of CSC involving Austin. Accordingly, *McKinley* dictates that defendant's abuse of Austin "may not be relied on as a basis for assessing restitution[.]" *Id*. at 419. Because the trial court lacked any authority to award restitution for defendant's uncharged conduct, we vacate the entirety of Austin's restitution award. In the remainder of this opinion, we therefore need only address the restitution awarded to Shane.

IV

Defendant contends that the restitution amounts allocated for Shane's future medical and psychological treatment and lost wages were not authorized by MCL 780.766. The evidence supporting these awards, defendant asserts, was entirely speculative and did not represent "easily ascertainable" or "measurable" losses.

Throughout the last four decades, this Court has repeatedly declared that restitution may encompass only those losses that are "easily ascertained and are a direct result of a defendant's criminal conduct." *Gubachy*, 272 Mich App at 708; see also *Tyler*, 188 Mich

App at 89; *People v Pettit*, 88 Mich App 203, 207 n 2; 276 NW2d 878 (1979). This oft-invoked rule was first established in *People v Heil*, 79 Mich App 739, 742, 748-749; 262 NW2d 895 (1977), which involved the propriety of a restitution order imposed as a condition of the defendant's probation. In *Heil*, a jury convicted the defendant of manslaughter arising from a car accident. *Id*. at 740-741. The trial court imposed a probation sentence conditioned on "payment within 90 days of $3,000 to the victim's wife, and additionally, payment of one half of defendant's after-tax income throughout the probation period." *Id*. at 741. When the defendant failed to make the payments, the trial court revoked his probation. *Id.*

On appeal, the defendant argued that the damages encompassed by the restitution award "ha[d] never been measured" and that the record lacked a factual basis for the computation of the sum. *Id*. at 748. This Court agreed, characterizing the "reparational amounts ordered paid" as "essentially arbitrary." *Id*. Moreover, the Court reasoned:

> The probation statute does not create a substitute for an action for civil damages. Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability. Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition; such restitution for personal injury, therefore, generally should be more limited in scope than civil damages. In the instant case we believe that restitution should encompass only those losses which are easily ascertained and measured, and which are a direct result of the defendant's criminal acts. [*Id*. at 748-749.]

Because the record failed to elucidate the "purpose of the payments" and "the manner in which they were determined," this Court reversed the order revoking

the defendant's probation. *Id*. at 749. Post-*Heil*, this Court has frequently echoed that restitution awards must be rooted in damages that are "easily ascertained and measured, and which are a direct result of the defendant's criminal acts."

We discern no rational basis for continuing to embrace *Heil*'s "easily ascertained and measured" formulation, as the *Heil* Court operated in an entirely different (and no longer pertinent) statutory milieu. The probation statute then in effect, MCL 771.3, permitted the sentencing court to " 'impose such other lawful conditions of probation, including restitution in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper.' " *Heil*, 79 Mich App at 742, quoting MCL 771.3. In *Heil*, the Court constructed a policy-driven limitation on the breadth of restitution orders imposed as conditions of probation. Here, however, we confront specific statutory language that displaces any need for policy analysis.

Enacted in 1985, the CVRA incorporates several highly specific provisions addressing restitution. Its central, "extensive" restitution section in the CVRA's felony article, MCL 780.766, permits recovery of "the costs of physical and occupational therapy, as well as the cost of psychological care for the victim and the victim's family, which at the time was not an ordinary part of restitution." Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 Pepperdine L Rev 59, 67 (1989). The statute's current version authorizes sentencing courts to order payment of "an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care." MCL 780.766(4)(a).

Thus, the plain language of the CVRA instructs sentencing courts that the standard to be applied when calculating a restitution amount is simply one of reasonableness. "Reasonably determined" future losses (including the cost of future medical and psychological care) are subject to restitution, provided that the court finds that such losses are "reasonably expected to be incurred." This language does not suggest the need for absolute precision, mathematical certainty, or a crystal ball. On the other hand, speculative or conjectural losses are not "reasonably expected to be incurred." Where the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met.[3]

The general restitution statute, MCL 769.1a, was also enacted in 1985. As we have noted, it sets forth a different standard for recovery of the costs of psychological care. Under MCL 769.1a(4)(a), an order of restitution may require a defendant to "[p]ay an amount equal to the cost of *actual* medical and related professional services . . . relating to . . . psychological care." (Emphasis added.) Our Supreme Court has defined the word "actual" as "existing in act, fact, or reality; real." *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 428; 733 NW2d 380 (2007) (quotation marks and citations omitted).

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[3] Although tort law principles are not necessarily controlling in the interpretation and application of the CVRA, we find them instructive. "In Michigan, in order to recover damages on the basis of future consequences, it is necessary for a plaintiff to demonstrate with 'reasonable certainty' that the future consequences will occur." *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 317; 399 NW2d 1 (1986), citing *Prince v Lott*, 369 Mich 606, 609; 120 NW2d 780 (1963). See also *King v Neller*, 228 Mich 15, 22; 199 NW 674 (1924) ("[O]nly such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained . . . .").

The trial court properly awarded restitution for the costs of the "actual" professional services rendered to Shane in the amount of $1,785. The more difficult question is whether the CVRA authorizes the award ordered by the trial court for Shane's future psychological care expenses. While future (not yet incurred) psychological expenses indisputably fall within the ambit of MCL 780.766(4)(a), the prosecution must demonstrate by an evidentiary preponderance that the claimed expenses are "reasonably expected to be incurred." Here, we find the requisite proof sorely lacking.

In his direct testimony, McGonigle hedged as to the specifics of the therapy he proposed: "I was expecting kind of a long course of treatment with possible referral to in-patient intensive therapy as needed." He was even less certain regarding the amount of money needed to address Shane's future psychological therapy needs. McGonigle admitted that the numbers he provided the court were conjectural:

> *Q*. [Y]ou say they both likely have a long way to go with various modes of therapy before they are capable of following through with their goals. When you say they are both likely, *you can't provide opinions as to what they need, and in terms of actually following through with their goals though*?
>
> *A*. Yeah.
>
> *Q*. That's correct?
>
> *A*. And, I would like to comment on that if I could?
>
> *Q*. Absolutely.
>
> *A*. I'm actually prohibited in my practice from giving people any solid figures about how much treatment it will take to get over their problem. And, treatment is very - - *it's really hard to get an exact amount as a prescription*.
>
> *Q*. I'm sorry?

A. What I think I can do is look at, and that applies to an individual, what you can do is there is research that indicates average lengths of time that it takes to work out certain severity of problems and how much therapy is needed and that's what I relied on for my report.

Q. And, that goes to your next sentence, the fourth paragraph, is that what you're basically saying? Well, under the circumstances it's never proper to predict the exact amount of therapy needed for any condition?

A. Yeah.

Q. *And, so, you don't know what needs to be reasonably expected to be incurred, in terms of dollars?*

A. *Well, not in the actual amount, but I think it's reasonable to say there's an average and this is what you would want available for someone facing this particular kind of problem, you would want to shoot in the ballpark and that's what you could expect with the average.*

Q. In your next page of that you indicate in a paragraph it's likely these boys may need psychiatric care. But, do I take it you have not referred them to any psychiatrist?

A. No, I did not. I think partly because they wanted to opt for a more therapeutic path, they weren't really open for that notion. I think as time evolves and as they mature and grow that could change. [Emphasis added.]

On redirect examination, the prosecuting attorney read the relevant statutory language aloud, and inquired, "is it your opinion that these amounts you quoted are reasonably expected to be incurred as a result of this crime in the future?" McGonigle answered affirmatively.

The trial court acknowledged that McGonigle had provided only general, one-size-fits-all numbers, but resolved the inherent uncertainties of McGonigle's calculations by fixing on figures below or equal to McGonigle's approximations:

> His Exhibit 3 recommends ongoing out-patient counseling treatment, that they should be seeing a counselor twice per week and he estimates I think it was 14 to 18,000 a year. We'll use 15,000 per year, he recommends 8 to 10 years, we'll go with 8 years then. And, that at, let's see here I said 15,000 a year times 8 years is $120,000, that would be for each of them. We'll deal with them separately, $120,000. Also he recommended 2 long-term treatment admissions to an in-patient program and he's got one that's mentioned here, but I don't think he says that specifically has to be the one, but that's an idea of what kind of cost it would be, and that would be 42,000 approximately per admission, that's described in Exhibit 3.

McGonigle's inability to provide the court with cost figures specific to Shane renders the court's estimates fatally uncertain. An informed guess as to a victim's future psychological therapy costs does not equate with an amount "reasonably expected to be incurred." While we recognize that an element of uncertainty always lurks in the background when a fact-finder predicts future damages, see *Hannay v Dep't of Transp*, 497 Mich 45, 86-88; 860 NW2d 67 (2014), the evidence presented here bore only the most tenuous connection to *Shane's* needs. McGonigle admitted that the numbers he supplied the court did not specifically apply to Shane, and did not constitute "solid figures about how much treatment" Shane would reasonably require to heal. Instead, McGonigle relied on "average lengths of time" regarding other, unspecified patients, found in "research" he failed to identify. This attenuated evidence did not suffice to demonstrate the loss that was "reasonably expected to be incurred," and it did not distinguish Shane's loss from the loss incurred by an average PTSD patient.

Moreover, McGonigle did not provide the court with sufficient grounds for a reasonably accurate restitution

award predicated on the "direct" harm Shane sustained "as a result of the commission of a crime." MCL 780.766(1). In *McKinley*, 496 Mich at 421, the Supreme Court emphasized that "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." As noted by our Supreme Court in *McKinley*, Michigan's restitution statute instructs a sentencing court to "consider the amount of the loss sustained by any victim *as a result of the offense*." *Id*., quoting MCL 780.767(1) (quotation marks omitted). The phrase "as a result of" contemplates factual causation. See *People v Laidler*, 491 Mich 339, 344-345; 817 NW2d 517 (2012). "The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred?" *People v Schaefer*, 473 Mich 418, 435-436; 703 NW2d 774 (2005), mod in part on other grounds, *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). "Proximate cause," too, "is a standard aspect of causation in criminal law and the law of torts." *Paroline v United States*, 572 US___, ___; 134 S Ct 1710, 1720; 188 L Ed 2d 714 (2014). "For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a 'direct and natural result' of the defendant's actions." *Schaefer*, 473 Mich at 436 (citations omitted). The CVRA, we conclude, permits an award only for losses factually and proximately caused by the defendant's offense; nothing in the text or structure of the statute suggests otherwise.

The record contains no evidence that defendant's conduct caused the specific future loss reflected in the restitution awarded by the trial court. Perhaps Shane will require precisely the amount of therapy that the trial court awarded. On this record, however, we have

no basis for drawing a reasonable conclusion that likely he will, as the only guidance on that score was provided by McGonigle, who admitted that he was "actually prohibited . . . from giving people any solid figures about how much treatment it will take to get over their problem." Thus, we perceive no direct relationship between the psychological consequences of defendant's criminal acts toward Shane and the amount of restitution awarded. While Shane is entitled to restitution for future psychological therapy expenses that he reasonably expects to incur as a direct result of defendant's criminal acts, "[r]estitution is not intended to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses." *United States v Huff*, 609 F3d 1240, 1249 (CA 11, 2010) (quotation marks and citation omitted). McGonigle's testimony did not inform the trial court what it would take to make Shane whole (as opposed to any average sexual abuse victim). His "ballpark" estimate may have been the best he could offer as a licensed social worker, but no evidence suggests that a more certain estimate, predicated specifically on Shane's condition and likely future needs, was otherwise impossible to procure.

Even less evidence substantiated the trial court's $31,200 award for Shane's lost wages. The CVRA provides for restitution of "after-tax income loss suffered by the victim as a result of the crime." MCL 780.766(4)(c). The victims' father testified that both young men had been offered summer positions in Traverse City paying $400 per week (we assume pre-tax), which they had been unable to accept due to the pending court proceedings. The trial court assumed that $400 represented "the amount they could have made in the market," and that they would have worked continuously throughout the summer and for the next 78 weeks, when both

obtained work in Kansas City. But lost earning capacity is not the same as "income loss."

Unfortunately, the CVRA does not provide a definition of the term "income loss." In filling in this gap, we look to a dictionary for a definition of the relevant term. "Income" is "[t]he return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc." *Black's Law Dictionary* (6th ed). Here, Shane never had an "income" that defendant's conduct caused him to lose. Even assuming that Shane's loss of the ability to earn income at the ice cream store correlates to "income loss," the court made no effort to calculate after-tax income loss, as required by the statute. Furthermore, no evidence suggested that the brothers lacked the ability to earn wages for a full 78 weeks.

In summary, we vacate the trial court's order awarding Shane restitution for future therapy costs, future medication expenses, future psychiatric services, and lost wages. The sums awarded for these categories of loss were not "reasonably determined," and do not correspond to amounts "reasonably expected to be incurred" by Shane for future psychological care or after-tax income loss. We remand for correction of the order to reflect the amount paid for psychological therapy, $1,785. Should the prosecution elect to present additional testimony, the court may conduct a new restitution hearing.

V

We now turn to the remaining issue that the Supreme Court ordered added for consideration when it remanded the case to this Court. Citing *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), *Southern Union Co v United States*, 567 US ___; 132 S Ct 2344; 183 L Ed 2d 318 (2012), and *Alleyne*

v United States, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), defendant contends that because restitution is a form of punishment, the Sixth Amendment requires that a jury, rather than a sentencing court, determine the amount owed. Many other courts have considered the same argument. None have resolved this challenge in the manner defendant urges. We decline the opportunity to break new legal ground.

In *Southern Union*, 567 US at ___; 132 S Ct at 2348-2349, the United States Supreme Court held that the amount of a criminal fine imposed as part of a defendant's sentence must be determined by a jury. The Supreme Court's opinion in *Apprendi* dictated this result, the Court explained, as "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' " *Id*. at ___; 132 S Ct at 2350 (citation omitted). A criminal fine and restitution are not synonymous, however. A plethora of federal circuit courts of appeal have held that "judicial factfinding to determine the appropriate amount of restitution under a statute that does not prescribe a maximum does not implicate a defendant's Sixth Amendment rights." *United States v Bengis*, 783 F3d 407, 413 (CA 2, 2015) (citing cases from three other circuits). A few other circuits have rejected defendant's argument based on the conclusion that restitution is a civil rather than a criminal penalty, negating *Apprendi*'s relevance. *United States v Kieffer*, 596 Fed Appx 653, 664 (CA 10, 2014) (citing additional cases). Still other courts consider restitution a criminal penalty but have nonetheless concluded that the Sixth Amendment erects no obstacle to judicial fact-finding as to the amount owed:

> Restitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a

> result of a defendant's criminal conduct. In this sense, even though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged. Rather, restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner. In these circumstances, we do not believe that ordering a convicted defendant to return ill-gotten gains should be construed as increasing the sentence authorized by a conviction pursuant to *Booker*.[4] [*United States v Leahy*, 438 F3d 328, 338 (CA 3, 2006).]

We are unaware of any state or federal courts that have adopted defendant's constitutional argument and find it unavailing.[5]

We vacate the order of restitution entered by the trial court. On remand, the prosecution may seek leave from the trial court to conduct a second restitution hearing. Regardless of the result of that hearing, no restitution shall be awarded to Austin. Should the prosecution elect against convening another hearing, the trial court shall enter an order of restitution awarding Shane $1,785. We do not retain jurisdiction.

K. F. KELLY and SERVITTO, JJ., concurred with GLEICHER, P.J.

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[4] In *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court struck down the mandatory application of the federal sentencing guidelines as violative of the Sixth Amendment.

[5] We acknowledge that our Supreme Court recently decided in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), that *Apprendi*, as extended by *Alleyne*, renders Michigan's sentencing guidelines "constitutionally deficient" to the extent they "require judicial fact-finding beyond facts admitted by the defendant or found by the jury" to score variables that mandate an increased floor for the minimum sentencing guidelines range. (Emphasis omitted.) *Lockridge*, 498 Mich at 364. Nothing in *Lockridge* suggests that its reasoning encompasses restitution orders entered in conjunction with sentencing.

NICKOLA v MIC GENERAL INSURANCE COMPANY

Docket No. 322565. Submitted September 10, 2015, at Detroit. Decided September 24, 2015, at 9:00 a.m. Leave to appeal sought.

George and Thelma Nickola brought a declaratory action in the Genesee Circuit Court against MIC General Insurance Company (their no-fault insurer) in April 2005, asking the court to compel arbitration. The Nickolas had been injured when another car struck theirs. After the other driver's insurer settled with the Nickolas and paid them the limits of his policy, the Nickolas sought underinsured-motorist (UIM) benefits under their policy. MIC denied the claim. The Nickolas then sent MIC a written demand for arbitration of their claim. Although the policy stated that either party could demand arbitration, MIC denied the Nickolas' demand, stating that it had never agreed to arbitrate and that both parties had to agree before a UIM claim could proceed to arbitration. In November 2005, however, after the Nickolas had brought their lawsuit, MIC stated that it did not object to arbitration. Because MIC had initially denied that arbitration was proper, the Nickolas moved for sanctions against it. The court, Richard B. Yuille, J., entered an order in March 2006, submitting the matter to arbitration, but reserving any ruling on the request for sanctions, instead ordering the Nickolas to provide the court and MIC a list of costs, expenses, and attorney fees, which they agreed to do. The court retained jurisdiction to enforce compliance and make further determinations, orders, or judgments as necessary. Under the policy, each party was to select one arbitrator, and the two arbitrators would then select a third. If they could not agree within 30 days, however, either could request that the court make the selection. The parties named their respective arbitrators soon after the court's order, but the chosen arbitrators could not agree to the appointment of the third. Neither party took action on the matter for more than six years. During that time the Nickolas died and their son, Joseph G. Nickola (plaintiff) was appointed as personal representative of their estates and substituted as plaintiff in the action. In August 2012, he moved for the trial court to appoint the third arbitrator. The parties finally proceeded to arbitration in October 2013, and the arbitration panel awarded $80,000 to

plaintiff for George's injuries and $33,000 for Thelma's injuries. The awards were to be inclusive of interest, if any, as an element of the damages from the date of injury to the date of suit, but were not inclusive of other interest, fees, or costs that the court might otherwise allow. In November 2013, plaintiff moved for (1) attorney fees and sanctions because of MIC's frivolous defense to arbitration, (2) penalty interest under MCL 500.2006, part of the Uniform Trade Practices Act (UTPA) (MCL 500.2001 *et seq*.) for MIC's failure to promptly pay UIM benefits, and (3) entry of a judgment against MIC on the arbitration award. The court denied the motion in all respects, but stated that it "affirmed" the arbitration award. With regard to penalty interest, the court found that the UTPA did not apply to a claim for UIM benefits and that even if it did, the claim was reasonably in dispute and not subject to penalty interest. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff argued that the trial court should have granted sanctions against MIC under MCR 2.114 for initially asserting in its filings with the court that arbitration could not be demanded unilaterally under the insurance policy. Neither plaintiff nor the Nickolas ever complied with the trial court's order to provide proof of their costs and attorney fees, however, even by the date of the 2014 renewed request for sanctions. The failure to comply with that order, despite having had years to do so, was tantamount to a waiver of the issue.

2. MCL 500.2006(1) provides that an insurer must timely pay its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third-party tort claimant the benefits provided under the terms of its policy. If the insurer does not pay the benefits in a timely fashion, MCL 500.2006(4) provides for the imposition of 12% interest on the benefits if the claimant is the insured or an individual or entity directly entitled to benefits under the policy. If the claimant is a third-party tort claimant, however, that interest is imposed if the insurer's liability for the claim is not reasonably in dispute, the insurer refused payment in bad faith, and a court determined that there was bad faith. Accordingly, MCL 500.2006(4) draws a distinction between a claimant who is the insured or an individual directly entitled to benefits under a policy (a first-party insured) and one who is a third-party tort claimant. UIM benefits are not statutorily mandated but arise solely from the insurance policy. Plaintiff contended that he, as the Nickolas' personal representative, sought the payment of benefits that were owed directly to them as insureds under an insurance policy. Plaintiff,

however, did more than merely make a simple first-party claim. For plaintiff to succeed on his UIM claim, he had to essentially allege a third-party tort claim against the Nickolas' insurer. MIC, as the insurer, stood in the shoes of the alleged tortfeasor, and plaintiff sought benefits from MIC that arose from the tortfeasor's liability. Such a third-party tort claim is different in nature from a typical claim for first-party benefits because it will often require proof of the nature and extent of the injuries, proof of the injured person's prognosis over time, and proof that the injuries adversely affected the injured person's ability to lead his or her normal life. In addition, a third-party tort claim is designed to compensate a claimant for past and future pain and suffering and other economic and noneconomic losses rather than offering compensation for immediate expenses that are generally associated with a first-party claim. Plaintiff's UIM claim was therefore tied to a third-party tort claim for damages that was, in many respects, fundamentally different from a typical first-party claim. Moreover, the claim was reasonably in dispute, particularly with regard to whether the damages for the Nickolas' injuries exceeded the amount of the settlement with the other driver. Accordingly, the second part of MCL 500.2006(4) applied, and the trial court did not err by denying penalty interest to plaintiff.

3. Plaintiff also sought prejudgment interest under MCL 600.6013 from the date of the filing of the complaint in April 2005 until payment of the arbitration award. MCL 600.6013(8) provides that interest on a money judgment recovered in a civil action is calculated from the date of the filing of the complaint on the entire amount of the judgment, including attorney fees and other costs. Plaintiff never raised the issue of prejudgment interest before the trial court, however, and it appeared that the arbitration award had never been reduced to a judgment or paid. Despite the fact that plaintiff expressly sought entry of a judgment on the arbitration award, the trial court did not honor that request and simply "affirmed" the arbitration award. To that extent, the court erred. Because the arbitration award was never reduced to a judgment and the case had not otherwise been dismissed, plaintiff remained entitled to obtain a judgment on the award and could raise the issue of prejudgment interest at that time. MIC further argued that plaintiff was not entitled to prejudgment interest because of his and the Nickolas' delay in the case. While a court may disallow prejudgment interest for periods of delay that were not the fault of or caused by the debtor, however, it did not appear that all the delays in the case could be assigned to plaintiff and the Nickolas. If plaintiff seeks a judgment on the arbitration award and raises the issue of prejudg-

ment interest at the time, the delays can be a consideration for the trial court but should not at the outset deny plaintiff any claim to prejudgment interest under MCL 600.6013.

Affirmed in part and remanded for further proceedings.

Bendure & Thomas (by *Mark R. Bendure*) and *John D. Nickola* for plaintiff.

Harvey Kruse, PC (by *Michael F. Schmidt* and *Nathan Peplinski*), for defendant.

Before: GADOLA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM. In this action against defendant, MIC General Insurance Company, doing business as GMAC Insurance, concerning underinsured-motorist benefits, plaintiff, Joseph G. Nickola, as personal representative of the estates of George and Thelma Nickola,[1] appeals the June 19, 2014 order denying plaintiff's request for attorney fees and interest.[2] We affirm in part and remand for further proceedings.

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[1] George and Thelma were originally the plaintiffs in this action. However, during the pendency of this case, they passed away, requiring that their son, as personal representative, be substituted as the plaintiff. For ease of reference, we will refer to George and Thelma by name and will use the term "plaintiff" to refer to Joseph G. Nickola, the personal representative.

[2] Although plaintiff's claim of appeal asserts that this appeal of the June 19, 2014 order is an appeal as of right, we do not agree. The order did not dispose of all the claims of the parties, see MCR 7.202(6)(a)(i) (describing final orders); notably, as discussed in more detail later, the order did not resolve plaintiff's request for entry of a judgment on the arbitration award. Moreover, because there is no judgment, the order appealed does not qualify as a postjudgment order awarding or denying attorney fees and costs under MCR 7.202(6)(a)(iv). However, in the interest of judicial economy, we exercise our discretion and treat the claim of appeal as an application for leave to appeal and grant the application. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves a protracted procedural history. The matter arose out of a motor vehicle accident that occurred on April 13, 2004. George and Thelma, who were insured by defendant, were injured[3] when an automobile driven by Roy Smith, who was insured by Progressive Insurance Company, struck their automobile. The maximum available coverage on Smith's auto policy with Progressive was $20,000 per individual involved in an accident. George and Thelma, with defendant's consent, settled the tort claim, with Progressive paying its client's policy limits on or about November 21, 2004. Thereafter, they turned to defendant, their no-fault insurer, and sought underinsured-motorist (UIM) benefits. Defendant's policy with George and Thelma provided UIM coverage in the amount of $100,000 per person and $300,000 per accident; George and Thelma each sought $80,000, which represented the $100,000 policy limit minus the $20,000 already received from Progressive.

Defendant denied the claim for UIM coverage in February 2005, alleging that George and Thelma could not establish a threshold injury for noneconomic tort recovery under MCL 500.3135. In response to this denial, George and Thelma sent defendant a written demand for arbitration of their UIM claim, consistent with their auto policy. The UIM coverage provision in their policy with defendant provided that if the insurer and the insureds were unable to agree about (1) whether an insured was legally entitled to UIM damages or (2) the amount of UIM damages,

[3] As noted, George and Thelma died during the pendency of the instant litigation. According to the record, neither death was caused by injuries suffered in the motor vehicle accident that sparked this litigation.

> [*e*]*ither party may make a written demand for arbitration*. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. [Emphasis added.]

Despite the fact that the policy stated that *either* party could demand arbitration, defendant responded to the request for arbitration on March 1, 2005, by denying the demand, stating that it had never agreed to arbitrate and that *both* parties had to agree to arbitration under the policy before a UIM claim could proceed to arbitration. The reasons for defendant's denial in the face of the policy's arbitration clause are not entirely clear from the record.

Defendant's denial of the request for arbitration prompted George and Thelma to file a complaint for declaratory relief on April 8, 2005, in which they asked the trial court to compel arbitration. In answering the complaint, defendant "neither admit[ted] nor denie[d] the allegations" raised in the complaint concerning whether one party to its insurance contract with George and Thelma could unilaterally compel arbitration, but admitted that it had denied George and Thelma's written demand for arbitration. However, in a September 20, 2005 response to a request for admissions, defendant admitted that the arbitration language in the policy stated that *either* party could unilaterally demand arbitration. And in November 2005, defendant stated that it had "no objection to the matter being submitted to arbitration . . . ."

Because of defendant's initial denial that arbitration was proper, George and Thelma moved the trial court for sanctions against defendant. They claimed that any assertion by defendant that arbitration was not required under the policy was a "frivolous defense."

Following a hearing on February 14, 2006, the trial court entered an order submitting the matter to arbitration, but reserved ruling on George and Thelma's request for sanctions in relation to the few-month delay prompted by defendant's initial opposition to arbitration. Before it would rule on the matter, the court expressly ordered that George and Thelma "shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees[.]" At the motion hearing, George and Thelma's counsel promised to provide the trial court with this information. The trial court's written order, dated March 6, 2006, retained jurisdiction to "enforce compliance and/or make any other determination, orders and/or judgments necessary to fully adjudicate the rights of the Parties herein."

The parties named their respective arbitrators soon after the trial court's written order, but disagreement over the appointment of a third arbitrator brought the proceedings to a grinding halt. The chosen arbitrators could not agree about whom to appoint as the third arbitrator. Neither party took action on the matter for more than six years, until August 13, 2012, when plaintiff moved the trial court to appoint a third arbitrator.[4] It is unclear from the record what caused this lengthy delay. During this six-year delay, George and Thelma died, leading to the appointment of plaintiff as personal representative of their respective estates.

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[4] On appeal, defendant attempts to pin the entirety of the delay on plaintiff. However, the arbitration agreement contained in the policy provides that if the arbitrators selected by the parties were unable to agree on a third arbitrator within 30 days, "*either may request* that selection be made by a judge of a court having jurisdiction." (Emphasis added).

The parties finally proceeded to arbitration in October 2013, and the arbitration panel awarded $80,000 to plaintiff for George's injuries and $33,000 for Thelma's injuries. The awards were to be "inclusive of interest, if any, as an element of damages from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court."

On November 25, 2013, plaintiff moved the trial court for (1) attorney fees and sanctions because of defendant's frivolous defense to arbitration, (2) penalty interest under MCL 500.2006, part of the Uniform Trade Practices Act (UTPA) (MCL 500.2001 *et seq*.), for defendant's failure to promptly pay UIM benefits, and (3) entry of a judgment against defendant on the arbitration award. The trial court denied the motion in all respects, but stated that it "affirmed" the arbitration award. With regard to penalty interest, the court found that the UTPA did not apply to a claim for UIM benefits. Further, even if the UTPA did apply, the language "reasonably in dispute" in MCL 500.2006(4) insulated defendant from having to pay penalty interest. Finally, the trial court ruled that the issue of penalty interest should have been heard before the arbitration panel.

II. SANCTIONS UNDER MCR 2.114

Plaintiff argues that the trial court should have granted sanctions against defendant under MCR 2.114 for initially asserting in its filings with the court that arbitration could not be demanded unilaterally under the insurance policy. The trial court's 2006 order reserved a ruling on attorney fees but required George and Thelma to produce evidence of their attorney fees incurred during the delay caused by defendant's initial

refusal to arbitrate. Specifically, the order stated that "Plaintiff shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees[.]" George and Thelma and plaintiff never complied with that order. Indeed, even when plaintiff made a renewed request for sanctions in 2014, he never complied with the trial court's 2006 order to provide proof of his attorney fees incurred during the relevant period. Plaintiff's failure to comply with that order, despite having had years to do so, is tantamount to a waiver of this issue.[5] "The usual manner of waiving a right is by acts which indicate an intention to relinquish it, *or by so neglecting and failing to act* as to induce a belief that it was the intention and purpose to waive." *Cadle Co v Kentwood*, 285 Mich App 240, 254-255; 776 NW2d 145 (2009) (citation and quotation marks omitted; emphasis added). Given that plaintiff repeatedly failed to comply with the trial court's order to provide documentation of his attorney fees for the pertinent period, it is difficult to fault the trial court for failing to award those fees as a sanction under MCR 2.114. Indeed, plaintiff had more than eight years to supply the requested information about fees, but never did so. See *Reed Estate v Reed*, 293 Mich App 168, 177-178; 810 NW2d 284 (2011) (stating that waiver may be shown by a course of conduct, including neglecting and failing to act in such a manner as to induce the belief that the party failing or neglecting to act has the intent to waive). Plaintiff's failure to act and neglect of the trial court's mandate is tantamount to waiver. See *Cadle Co*, 285 Mich App at 254-255.

Plaintiff argues that it was "impossible" for him to determine the amount of attorney fees to which he was

[5] On appeal, plaintiff makes no effort to comply with the 2006 order and has yet to produce evidence of his claimed attorney fees.

allegedly entitled without waiting for arbitration to conclude. This ignores that the trial court, at the February 14, 2006 motion hearing, asked for the fees to which plaintiff believed he was entitled at that time. Plaintiff's counsel expressly promised to provide that figure. Plaintiff was to submit costs and fees incurred *during the time* between when defendant answered the complaint and admitted the mistake. There was never an invitation by the trial court to include in the amount of fees requested those fees incurred even after the matter went to arbitration. Any attempt by plaintiff to obtain additional fees ignored the court's order. Moreover, the argument ignores the fact that, even when arbitration was over, plaintiff still failed to provide the trial court information about his requested fees.

We also note that plaintiff seeks attorney fees for defendant's conduct that occurred *before* George and Thelma filed their complaint in 2005. That is, plaintiff appears to seek sanctions under MCR 2.114 for defendant's conduct in initially denying the UIM claim. Any argument by plaintiff in this regard is without merit. MCR 2.114(A) applies to "all pleadings, motions, affidavits, and other papers provided for by" the court rules. Defendant's initial decision to deny arbitration was not a pleading, motion, affidavit, or other paper filed under the court rules. Rather, it was simply a response to plaintiff's request for arbitration. Nothing about that response brings it within the ambit of materials that could subject defendant to sanctions under MCR 2.114.

III. PENALTY INTEREST UNDER THE UTPA

Plaintiff argues that the trial court erred by concluding that defendant was not required to pay penalty interest under the UTPA for its failure to timely pay

UIM benefits. This Court reviews de novo the trial court's ruling on a motion for penalty interest under MCL 500.2006(4). *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 475; 717 NW2d 341 (2006). Resolution of this issue also requires examination and interpretation of MCL 500.2006(4), which is an issue of law this Court reviews de novo. *Id*.

UIM benefits are not statutorily mandated; they are an agreement for benefits voluntarily entered into between an insured and an insurer. *Dawson v Farm Bureau Mut Ins Co of Mich*, 293 Mich App 563, 568; 810 NW2d 106 (2011). The UTPA provides a mechanism to help insureds obtain payment for these and other types of benefits in a timely manner. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 554; 741 NW2d 549 (2007). "MCL 500.2006 provides for imposition of penalty interest for the late payment of a claim . . . ." *Id*. The statute provides, in pertinent part:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
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> * * *
>
> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an

> individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. [MCL 500.2006(1) and (4).]

MCL 500.2006(4), the penalty-interest provision, draws a distinction between a claimant who is the insured or who is an individual directly entitled to benefits under an insurance contract (a first-party insured) and a claimant who is a third-party tort claimant. The first sentence of Subsection (4) simply states that a first-party insured is entitled to penalty interest if benefits are not paid within 60 days after the insurer obtains satisfactory proof of loss. *Griswold*, 276 Mich App at 565. As explained by this Court in *Griswold*, "[I]f the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute." *Id*. at 566 (citation and quotation marks omitted). By comparison, the second sentence of Subsection (4), which applies to third-party tort claimants, imposes penalty interest on the insurer *only* if the claim "is not reasonably in dispute." *Id*. at 565-566. Central to plaintiff's argument on appeal is the notion that the language "not reasonably in dispute" in MCL 500.2006(4) does not apply to claims by a first-party insured. Defendant, meanwhile, likens plaintiff to a third-party tort claimant in this claim for UIM benefits, meaning that the language "not reasonably in dispute" in MCL 500.2006(4) applies.

A brief examination of the facts at issue in *Griswold* is illustrative in resolving this issue. In deciding *Griswold*, this Court convened a special panel to resolve a conflict over the application of MCL 500.2006(4) and the types of claims to which the criterion of being "reasonably in dispute" applied. The case involved a consolidation of three cases. See *Griswold*, 276 Mich App at 559. Two cases involved insureds who sought benefits from their respective insurers for water damage. *Id*. at 559-560. In the third case, the insured's building was destroyed by a fire, and the insured sought benefits from its insurer for the damage caused by the fire. *Id*. at 560. In other words, each of the three consolidated cases involved insureds seeking benefits from their own insurers for losses that were directly covered under the respective policies.

Plaintiff contends that he, as the personal representative of the estates of George and Thelma, is seeking payment of benefits that were owed directly to insureds under an insurance policy. As noted, UIM benefits arise solely from the policy. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 194; 747 NW2d 811 (2008) (explaining that "[w]hen an insured is injured by a tortfeasor motorist whose own policy is insufficient to cover all of the insured's damages, *the insured can seek coverage from his or her UIM policy* for damages that exceed the tortfeasor's policy limits") (emphasis added). At first glance, plaintiff's argument—that he is entitled to penalty interest because he sought benefits that were owed directly to an insured by an insurer and that the language "reasonably in dispute" in MCL 500.2006(4) does not apply—has some appeal in light of *Griswold*.

However, the instant case is not as simple as *Griswold*. As noted, *Griswold* involved consolidated cases

in which each insurer was directly liable to its first-party insureds for covered losses. Here, while plaintiff is seeking UIM benefits that are provided under the policy, he is doing more than merely making a simple first-party claim, as was involved in *Griswold*. In order for plaintiff to succeed on his UIM claim, he essentially has to allege a third-party tort claim against his own insurer—or, in this case, against the insurer of George and Thelma, of whom plaintiff is the personal representative. Defendant, the insurer, stands in the shoes of the alleged tortfeasor, and plaintiff seeks benefits from defendant that arose from the alleged tortfeasor's liability. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 463-466; 430 NW2d 636 (1988) (explaining UIM coverage). See also *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005) (explaining that "[u]ninsured motorist insurance," which is substantially similar to UIM insurance, "permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the . . . at-fault driver"). This third-party tort claim is different in nature from a typical claim for first-party benefits, as it "will often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life." *Adam v Bell*, 311 Mich App 528, 535; 879 NW2d 879 (2015) (citation and quotation marks omitted). In addition, such a third-party tort claim is designed to compensate a claimant "for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses" that are generally associated with a first-party claim. *Id*. (citation and quotation marks omitted). In other words, plaintiff's UIM claim is tied to a third-party tort claim for

damages that, in many respects, is "fundamentally" different from a typical first-party claim. See *id*. (citation and quotation marks omitted).

In *Auto-Owners Ins Co v Ferwerda Enterprises, Inc (On Remand)*, 287 Mich App 248; 797 NW2d 168 (2010), vacated in part on other grounds 488 Mich 917 (2010),[6] this Court recognized that not all claims for penalty interest under MCL 500.2006(4) fit neatly into the *Griswold* analysis. In that case, the insurer sought a declaratory judgment stating that it had no duty to defend and indemnify its insureds in a third-party tort action based on an exclusion in the insurance policy. *Id*. at 252. The insureds filed a counterclaim, alleging breach of contract, estoppel, and waiver, and they requested penalty interest under MCL 500.2006(4). *Id*. The trial court found that there was coverage for the underlying third-party tort claim and awarded penalty interest under MCL 500.2006(4). *Id*. at 253-254. On appeal, the insureds defended the trial court's award of penalty interest on the ground that the insurer breached its contract by failing to pay benefits under the insurance policy. *Id*. at 258. The insureds argued that under *Griswold*, the issue of penalty interest turned only on the failure to pay benefits and not whether those benefits were reasonably in dispute. *Id*. at 259. This Court disagreed with the insureds' argument that the case involved a simple breach of the

[6] In *Ferwerda*, 287 Mich App 248, this Court decided two issues: (1) whether an award of attorney fees was appropriate and (2) whether the imposition of penalty interest was warranted. Our Supreme Court denied leave to appeal with regard to the penalty interest issue, but remanded with regard to the attorney fee issue. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 784 NW2d 44 (Mich, 2010). Subsequently, the Court vacated this Court's ruling regarding attorney fees. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 488 Mich 917 (2010). Thus, this Court's holding with respect to penalty interest remains good law.

insurance policy. Rather, in *Ferwerda* "the breach of contract claim [was] specifically tied to the underlying third-party tort claim." *Id*. That situation, reasoned the Court, was "a wholly different situation than that found" in *Griswold* and other cases that awarded penalty interest for the failure of an insurer to pay first-party claims. *Id*. at 259-260. As such, this Court held that the language "reasonably in dispute" found in the second sentence of MCL 500.2006(4) applied and precluded an award of penalty interest because the benefits in that case were reasonably in dispute. *Id*. at 260.

Applying *Ferwerda* in the case at bar, the trial court did not err by employing the language "reasonably in dispute" found in the second sentence of MCL 500.2006(4) and denying penalty interest to plaintiff. This case does not involve a claim in which the insured simply sought the payment of benefits due directly under an insurance policy. As in *Ferwerda*, 287 Mich App at 259, the situation in this case "is a wholly different situation than that found" in cases such as *Griswold*. Rather, the claim for benefits under the UIM coverage is "specifically tied to the underlying third-party tort claim." *Id*. Indeed, in the UIM context, defendant is standing in the shoes of the alleged tortfeasor. The fact that the claim for UIM benefits was specifically tied to the underlying third-party tort claim warrants applying the language "reasonably in dispute" found in the second sentence of MCL 500.2006(4). See *id*. The trial court did not err by applying this standard to plaintiff's claim for penalty interest.

Moreover, contrary to plaintiff's alternative contention on appeal, the claim in this case was reasonably in dispute. Even assuming that plaintiff could establish a

threshold injury, plaintiff's UIM claim needed to show that the injuries suffered by George and Thelma exceeded the amount of the settlement with Smith.[7] See *McDonald*, 480 Mich at 194 (explaining UIM coverage). Given George and Thelma's respective ages, preexisting conditions, and the nature of the injuries alleged in this case, the amount of damages, if any, that they were entitled to beyond what they received from Smith was a matter of reasonable dispute.[8] Thus, the trial court did not err by denying penalty interest under MCL 500.2006(4).

IV. PREJUDGMENT INTEREST

Lastly, plaintiff seeks prejudgment interest under MCL 600.6013 from the date of the filing of the complaint until payment of the arbitration award. "MCL 600.6013 entitles a prevailing party in a civil action to prejudgment interest from the date the complaint was filed to the entry of judgment." *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 624; 550 NW2d 580 (1996) (citation omitted). "The purpose of this statute is to compensate the prevailing party for loss of use of the funds awarded as a money judgment and to offset the costs of litigation." *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). Plaintiff seeks interest under MCL 600.6013(8), which provides:

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[7] The policy's UIM coverage provision states that "[w]e [the insurer] will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

[8] This is not to say that UIM benefits will in all cases be subject to reasonable dispute. For instance, in a scenario in which an accident rendered an otherwise healthy insured a quadriplegic and the tortfeasor's insurance policy provided only $20,000 in recovery, there could likely be no dispute that the insured was entitled to UIM coverage.

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Plaintiff is seeking prejudgment interest from the date of the complaint in April 2005 until the date of payment. Plaintiff never raised the issue of prejudgment interest before the trial court. In addition, it does not appear from the record that the arbitration award was ever reduced to a judgment or that the arbitration award has been paid. Under the Michigan arbitration act,[9] circuit courts have jurisdiction to enforce and render judgment on an arbitration award. Former MCL 600.5025. Here, despite the fact that plaintiff's

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[9] Effective July 1, 2013, the Legislature repealed the Michigan arbitration act, former MCL 600.5001 *et seq*., and replaced it with the Uniform Arbitration Act, MCL 691.1681 *et seq*. 2012 PA 370; 2012 PA 371; *Fette v Peters Constr Co*, 310 Mich App 535, 542; 871 NW2d 877 (2015). The Uniform Arbitration Act "does not affect an action or proceeding commenced or right accrued before this act takes effect." MCL 691.1713. See also *Fette*, 310 Mich App at 542. Because George and Thelma filed a complaint for arbitration in 2005, the Uniform Arbitration Act does not apply, and the Michigan Arbitration Act governs. See *id*.

motion expressly sought entry of a judgment on the arbitration award, the trial court did not honor that request. Instead, the court simply "affirmed" the arbitration award, and to that extent, the trial court erred. Because it does not appear that the arbitration award was ever reduced to a judgment, and this case has not otherwise been dismissed, plaintiff remains entitled to obtain a judgment on the award. And when seeking that judgment, because the issue of prejudgment interest was never decided, plaintiff can raise the issue of prejudgment interest at that time. Accordingly, we decline to address the prejudgment interest issue, without prejudice to plaintiff's raising it when he moves for entry of a judgment enforcing the arbitration award. Indeed, at this point, neither the arbitration panel[10] nor the trial court has decided the issue of plaintiff's entitlement to statutory prejudgment interest under MCL 600.6013.

Lastly, on the issue of prejudgment interest, we note that defendant contends that plaintiff should not be entitled to any prejudgment interest because of his—

[10] In this regard, we note that preaward, prejudgment interest would ordinarily be deemed to have been submitted to the arbitration panel. See *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996) ("The decision whether to award preaward, prejudgment interest as an element of damages is reserved as a matter of the arbitrator's discretion."). In this case, there was nothing in the arbitration agreement reserving the issue of preaward, prejudgment interest. However, the arbitration award expressly stated that the arbitration panel awarded interest as an element of damages from the time of the injury to the time the complaint was filed, but did not decide matters pertaining to "other interest." Prejudgment interest after the filing of the complaint fits into the broad category of "other interest." Thus, the arbitration panel expressly declined to address the prejudgment interest plaintiff is now seeking. The record contains no indication of why the arbitration panel did not consider any other interest, nor is there any indication that the parties objected to the arbitration panel's decision in this regard.

and George and Thelma's—delays in this case. "[A] court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor." *Eley v Turner*, 193 Mich App 244, 247; 483 NW2d 421 (1992). However, it is not apparent that all the delays in this case can be attributed to plaintiff. With regard to the six-year delay caused by disagreement over the third arbitrator, defendant is incorrect in stating that the arbitration agreement required the insured, and only the insured, to petition the circuit court to select a third arbitrator in the event of disagreement. Rather, the agreement as embodied in the policy states that "*either* may request that selection" of a third arbitrator "be made by a judge of a court having jurisdiction." (Emphasis added.) If plaintiff raises the issue of prejudgment interest at the time he seeks a judgment on the arbitration award, the delays in this case can be a consideration for the trial court, but should not at the outset deny plaintiff any claim to prejudgment interest under MCL 600.6013.

Affirmed in part and remanded to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

GADOLA, P.J., and JANSEN and BECKERING, JJ., concurred.

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES v DEPARTMENT OF TREASURY

Docket Nos. 325258, 325475 through 325492, 325505 through 325511, 325515 through 325518, 325520, 325522, 325523, 325525, 325526, 325528, 325529, 325532 through 325535, 325541, 325972, 325974, 326039, 326075, 326080, 326110, 326123, and 326136. Submitted September 2, 2015, at Detroit. Decided September 29, 2015, at 9:00 a.m. Leave to appeal denied 499 Mich 960.

Gillette Commercial Operations North America & Subsidiaries and others brought separate actions in the Court of Claims against the Department of Treasury, seeking tax refunds premised on the three-factor apportionment formula set forth in the Multistate Tax Compact, former MCL 205.581 *et seq*. Plaintiffs were all out-of-state corporations with business activities in Michigan. Defendant refused the refund requests, asserting that the only apportionment method available to plaintiffs was single-factor apportionment under MCL 208.1301 of the Michigan Business Tax Act (MBTA). In each action, the Court of Claims, MICHAEL J. TALBOT, J., granted summary disposition in favor of defendant, concluding that 2014 PA 282 retroactively repealed the compact and negated the basis of plaintiffs' claims. The court rejected plaintiffs' challenges to the enactment of 2014 PA 282, concluding that it was a valid, constitutional act. Plaintiffs appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The state and federal Constitutions forbid the enactment of laws impairing the obligation of contracts. Although the language of the federal Contracts Clause is absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of its people. In order to determine whether the Contracts Clause's prohibition should be accommodated, the Supreme Court developed a three-part test that examines (1) whether a change in state law has operated as a substantial impairment of a contractual relationship, (2) whether the state has a significant and legitimate public purpose for the regulation, and (3) whether the adjustment of the rights and responsibilities of the contracting parties is based on reasonable

conditions and is of a character appropriate to the public purpose justifying adoption of the legislation. In Michigan, there is a strong presumption that statutes do not create contractual rights. There were no words in the compact that indicated that the state intended to be bound to the compact. Therefore, the presumption had to be that the state did not surrender its legislative power to require use of a different apportionment formula or to repeal the compact altogether. Accordingly, plaintiffs' state and federal Contracts Clause arguments were unavailing because they were premised on an incorrect view that the compact was a binding contract under state law.

2. Plaintiffs further argued that Michigan created binding contractual obligations by entering into the compact and that those obligations were enforceable under the Contracts Clause. The classic indicia of a binding interstate compact are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal. Although the compact created a joint regulatory agency, it did not confer any governing or regulatory powers on that body. Each state retained complete freedom to adopt or reject the rules and regulations of the commission. There was also nothing reciprocal about the compact's provisions. Each member state operated its tax system independently from the tax systems of other member states. The compact also allowed unilateral modification and withdrawal without notice to other member states. Accordingly, the compact was not a binding agreement on the state, and the enactment of 2014 PA 282 was not prohibited.

3. The Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. But to be protected by the Due Process Clause, a property interest must be a vested right. A vested right is an interest that the government is compelled to recognize and protect, of which the holder may not be deprived without injustice. Federal and state courts have uniformly held that retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means and the period of retroactivity is modest. A taxpayer's reliance on a view of the law—even a correct view of the law—does not prevent the Legislature from retroactively amending the statute. To be vested, a right must be more than a mere expectation based on an anticipated continuance of the present laws. A legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor

drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as rationally related to a legitimate legislative purpose. In this case, the retroactive effect of 2014 PA 282 did not violate the Due Process Clauses of either the state or federal Constitutions. Plaintiffs did not have a vested interest protected by the Due Process Clause in the continuation of the compact's apportionment provision, and the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282. Specifically, it was legitimate for the Legislature to correct the Michigan Supreme Court's perceived misinterpretation of a prior law in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642 (2014), and eliminate a significant revenue loss resulting from that misinterpretation. Retroactive application of 2014 PA 282 was also a rational means to further these legitimate purposes. 2014 PA 282 did not reach back to assess a wholly new tax on long-concluded transactions. Rather, it clarified the method of apportionment for the previously enacted MBTA, had a modest look-back period, and the Legislature promptly enacted 2014 PA 282 after the Michigan Supreme Court issued its opinion in *Int'l Business Machines*.

4. The Separation of Powers Clause of the Michigan Constitution, Const 1963, art 3, § 2, states that generally no person exercising the powers of one branch of government shall exercise powers properly belonging to another branch. The Legislature did not violate this clause by obviating the Supreme Court's decision in *Int'l Business Machines*. The Legislature lacks authority to reverse a judicial decision or repeal a final judgment, but it has the authority to amend a statute that it believes has been misconstrued by the judiciary. 2014 PA 282 did not overturn the *Int'l Business Machines* decision. Instead, the Legislature created a new law, not interpreted by the courts, that explicitly repealed the compact provisions effective January 1, 2008, to further what the Legislature understood to have been its original intent when it enacted 2007 PA 36. This did not impinge on the judiciary's role of interpreting the law but instead corrected a mistake that was made clear by the holding in *Int'l Business Machines*.

5. The Commerce Clause, US Const, art I, § 8, provides that Congress shall have the power to regulate commerce among the several states, and has been held to prohibit discrimination against interstate commerce and bar state regulations that unduly burden interstate commerce. A tax violates the Commerce Clause if it is facially discriminatory, has a discriminatory purpose, or has the effect of unduly burdening interstate commerce.

2014 PA 282 did not create any classification based on a taxpayer's state of origin or the location of commerce and, therefore, was not facially discriminatory. No evidence was presented that 2014 PA 282 had a discriminatory purpose. In fact, 2014 PA 282 put in- and out-of-state corporate taxpayers in the same position relative to Michigan tax calculations. Finally, 2014 PA 282 did not have a discriminatory effect; it merely precluded both in-state and out-of-state taxpayers from electing the three-factor apportionment formula previously available under the compact. The federal Constitution does not require the use of a particular apportionment formula, and a single-factor formula is presumptively valid. Accordingly, enactment of 2014 PA 282 did not violate the Commerce Clause.

6. The right of citizens to petition their government for redress of grievances is specifically guaranteed by the United States Constitution, US Const, Am I, and the Michigan Constitution, Const 1963, art 1, § 3. The right to petition extends to all departments of the government and includes a right of access to the courts. In this case, plaintiffs contended that, through the enactment of 2014 PA 282, they were denied the right to petition defendant and to appeal to a court for a refund of taxes already paid. The elements of a backward-looking denial-of-access claim include obstructive actions by state actors. Although plaintiffs contend that enactment of 2014 PA 282 obstructed their access to the courts by retroactively destroying their right to elect the three-factor apportionment formula under the compact, a backward-looking denial-of-access claim can only prevail when the government is accused of barring the courthouse door by concealing or destroying evidence. There is no allegation in these cases that defendant or any state actor has concealed or destroyed evidence. The enactment of 2014 PA 282 retroactively repealing the compact and requiring the use of a single-factor apportionment formula did not interfere with plaintiffs' abilities to file claims or seek refunds from the courts or defendant. All that plaintiffs were prohibited from doing was seeking a refund under one particular apportionment formula. This did not violate the First Amendment.

7. Plaintiffs also challenged 2014 PA 282 under Michigan's Title-Object Clause, Const 1963, art 4, § 24; the Five-Day Rule, Const 1963, art 4, § 26; and the Distinct-Statement Clause, Const 1963, art 4, § 32. Under the Title-Object Clause, no law may embrace more than one subject, which must be expressed in its title, and no bill may be altered or amended on its passage through either house so as to change its original purpose as

determined by its total content and not alone by its title. The single object of 2014 PA 282 was to amend 2007 PA 36, the MBTA. This general object was accomplished by amending provisions of the MBTA and by repealing the compact. This object was reflected in the title of 2014 PA 282, which referred to the amendment of sections of 2007 PA 36 and the repeal of acts and parts of acts. Enacting § 1 of 2014 PA 282 clarified that the repeal of the compact and the concomitant elimination of the apportionment election provision was germane to the object of amending the MBTA in that it clarified the appropriate method of apportionment. In other words, the compact and the MBTA were related to one another because each pertained to the method of apportionment. Thus, 2014 PA 282 did not contain diverse subjects that had no necessary connection. Rather, repeal of the compact directly related to, carried out, and implemented the principal object of amending the MBTA. Although the title did not use the word "compact," a title need not be an index of all of an act's provisions, and neither legislators nor the public were deprived of notice of the challenged provision. Further, amendment of the bill that became 2014 PA 282 as it went through the Legislature did not result in the introduction of an entirely new subject matter. Rather, it permissibly extended the basic purpose of the original bill. Accordingly, there was no Title-Object Clause violation. Under the Five-Day Rule, no bill may be passed or become a law at any regular session of the Legislature until it has been printed or reproduced and in the possession of each house for at least five days. The function of the change-of-purpose provision in the Title-Object Clause is to fulfill the command of the Five-Day Rule. In this case, the legislative record established that the bill that became 2014 PA 282 was before each house for at least five days, and there was no change in the bill's original purpose. Therefore, no violation of the Five-Day Rule occurred. The Distinct-Statement Clause provides that every law that imposes, continues, or revives a tax must distinctly state the tax. The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax. 2014 PA 282 did not impose or revive any tax. It clarified the Legislature's intent regarding the method of apportionment under the MBTA. There was nothing deceptive about the legislation, and there was no violation of the Distinct-Statement Clause.

8. Summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion. In this case, plaintiffs wanted to engage in further

discovery, but the issues raised in these cases concerned statutory interpretation and constitutional challenges, which are matters of law. Plaintiffs failed to establish a fair chance that further discovery would have led to any relevant support for their position.

Affirmed.

TAXATION — RETROACTIVE REPEAL OF THE MULTISTATE TAX COMPACT — CONSTITUTIONALITY.

Enactment of 2014 PA 282, which retroactively repealed the Multistate Tax Compact, former MCL 205.581 *et seq*., effective January 1, 2008, did not violate the state or federal Contracts Clauses (US Const, art I, § 10, cl 1; Const 1963, art 1, § 10), state or federal Due Process Clauses (US Const, Am XIV; Const 1963, art 1, § 17), the state Separation of Powers Clause (Const 1963, art 3, § 2), the federal Commerce Clause (US Const, art I, § 8), the right of citizens to petition their government for redress of grievances (US Const, Am I; Const 1963, art 1, § 3), or the state Title-Object Clause, Five-Day Rule, or Distinct-Statement Clause (Const 1963, art 4, §§ 24, 26, and 32).

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas* and *Brian T. Quinn*) and *Silverstein & Pomerantz LLP* (by *Amy Silverstein* and *Edwin Antolin*) for Gillette Commercial Operations North America & Subsidiaries.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Gregory A. Nowak*, *Michael P. Coakley*, and *David G. King*), for Yaskawa America, Inc., Rainier Investment Management, Inc., and others.

Honigman Miller Schwartz and Cohn LLP (by *Daniel L. Stanley* and *Brian T. Quinn*) for Sonoco Products Company.

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin*, *Daniel L. Stanley*, and *Brian T. Quinn*) for Anheuser-Busch, LLC, Ingram Micro, Inc., and others.

Michael Best & Friedrich LLP (by *Brian R. Tumm*) and *Sutherland Asbill & Brennan LLP* (by *Jonathan A. Feldman* and *Eric S. Tresh*) for Lubrizol Corporation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Eric M. Jamison*, *Zachary C. Larsen*, *Michael R. Bell*, *Scott L. Damich*, *Emily C. Zillgitt*, and *Randi M. Merchant*, Assistant Attorneys General, for the Department of Treasury.

Amicus Curiae:

Richard D. Pomp *in propria persona*.

Before: MURRAY, P.J., and JANSEN and METER, JJ.

MURRAY, P.J.

I. INTRODUCTION

In these consolidated appeals, numerous foreign[1] corporations doing business in Michigan appeal as of right the trial court's orders granting summary disposition to defendant, the Michigan Department of Treasury, pursuant to MCR 2.116(I)(1), and dismissing their complaints.

These cases involve a significant number of state and federal constitutional challenges to 2014 PA 282, which the Legislature—taking the cue from the Supreme Court in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) (*IBM*)—enacted to retroactively rescind Michigan's membership in the Multistate Tax Compact (the Com-

[1] By foreign we mean corporations that were incorporated outside Michigan, not necessarily outside the United States.

pact), precluding foreign corporations from utilizing a three-factor apportionment formula previously available under the Compact. See former MCL 205.581 *et seq*., as enacted by 1969 PA 343. In a well-written and well-reasoned opinion, the trial court rejected each of the constitutional challenges.[2] For the reasons expressed below, so do we. Consequently, we affirm the trial court's final orders of dismissal.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

Rather than re-creating the wheel, we adopt the trial court's recitation of the background facts leading to these lawsuits:

> **History of the Compact**
>
> The Compact is an interstate tax agreement that was originally enacted in 1967 by the legislatures of seven states. The Compact was initially drafted out of concerns of state sovereignty in reaction to the introduction of federal legislation that sought to regulate various areas of state taxation.[3] The original purposes of the Compact included:
>
> > (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative

[2] The trial court, MICHAEL J. TALBOT, J., issued two full opinions in these cases. The orders resolving the other cases referred back to the reasoning set forth in those opinions. For ease of reference, when we refer to the trial court's reasoning, we are referring to the reasoning set forth in *Yaskawa America, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Case No. 11-000077-MT).

> taxation. [*US Steel Corp v Multistate Tax Comm*, 434 US 452, 456; 98 S Ct 799; 54 L Ed 2d 682 (1978).[4]]

Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343.

Apportionment Formulas under the Compact and the MBT Act

The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating [Michigan business tax (MBT)]. Under the MBT Act, created by 2007 PA 36,[5] income is apportioned by applying a single factor apportionment formula based solely on sales. MCL 208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the MBT Act's single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies that do not have significant property and payroll located in Michigan.

Decision in *IBM*

In *IBM*, 496 Mich 642, the Supreme Court considered the issue of whether MBT taxpayers must use a single-factor apportionment formula as mandated by the MBT Act or whether MBT taxpayers may elect to apply a three-factor apportionment formula under the Compact. The parties were asked by the Court to brief four issues:

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq*.; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally

> altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. [*Int'l Business Machines v Dep't of Treasury*, 494 Mich 874; 832 NW2d 388 (2013).]

In its decision, the Court determined that for tax years 2008 through 2010,[6] the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq*., and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning of the Compact. The Court did not reach the third issue of whether the Compact constitutes a contract. On November 14, 2014, the Michigan Supreme Court denied reconsideration. *Int'l Business Machines v Dep't of Treasury*, [497 Mich 894]; 855 NW2d 512 (2014).

Retroactive Repeal of the Compact Provisions by [2014] PA 282

On September 11, 2014, 2013 SB 156 (SB 156) was enacted into law as [2014] PA 282, amending the MBT Act and expressly repealing the Compact provisions, as codified under MCL 205.581 to MCL 205.589. The Legislature gave the Act retroactive effect by providing as follows:

> Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that

> amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

[2014] PA 282 thus amended the MBT Act to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT Act's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581.[8] The effect of the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT Act and income tax act.

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[3] The legislation, which was never enacted, was introduced in the wake of *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which held that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.

[4] The Compact was never approved by Congress, but it was upheld against constitutional challenges in *US Steel*, 434 US 452.

[5] For a history of business taxation in Michigan, see *IBM*, 496 Mich at 648-650.

[6] The Legislature explicitly repealed the Compact apportionment provisions effective January 1, 2011, through enactment of 2011 PA 40.

[8] [2014] PA 282 also clarified that the Compact's election provision is not available under the income tax act of 1967, 1967 PA 281.

Between 2011 and 2015 these multistate taxpayers all filed suit in the Court of Claims seeking refunds due under the Compact that had been refused by Treasury on the ground that the only apportionment method available was that established by the MBT. Most of the cases were filed prior to the Supreme Court's resolution of *IBM*, so the trial court prudently held the cases in abeyance pending that decision. Ultimately, however, the case was resolved not by the *IBM* decision, but by passage of 2014 PA 282, at least once the trial court upheld the statute against plaintiffs' constitutional challenges. We now turn our attention to those same constitutional arguments.

III. ANALYSIS

A. STANDARDS OF REVIEW

The trial court entered summary disposition in favor of Treasury under MCR 2.116(I)(1), a decision which we review de novo. *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009). MCR 2.116(I)(1) states, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." We likewise pay no deference to the trial court's statutory interpretation or resolution of constitutional issues, as both of those issues also require review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013); *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).[3]

[3] Though we can give no deference to the trial court's legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court's legal rulings careful consideration.

B. GENERAL PRINCIPLES

Before delving into our analysis of these issues, we first set forth in chronological sequence several undisputed factual matters and legal principles that, although partially contained in Part II of this opinion, are worth keeping in mind as they provide critical background for our decision:

1. Michigan became a member state to the Compact in 1970.

2. A member state can withdraw from the Compact by "enacting a statute repealing the same." Former MCL 205.581, art X(2).

3. Under the Compact as originally enacted, a foreign business taxpayer had the option of either utilizing the apportionment formula under the Compact or what was available under a state's tax laws. Former MCL 205.581, art III.

4. The Michigan Business Tax Act, enacted into law in 2007 and effective January 1, 2008, required foreign business taxpayers to use the apportionment formula contained in the act. MCL 208.1301(2) and MCL 208.1303.

5. In 2011, the Legislature repealed the apportionment provision of the Compact, effective January 1, 2011. 2011 PA 40.

6. In *IBM*, the Supreme Court held that through 2011 PA 40 the Legislature created a window (from January 1, 2008 until January 1, 2011) wherein certain taxpayers could still utilize the apportionment option available under Article IV of the Compact. The Court recognized that the Legislature "could have—but did not—extend this retroactive repeal to the start date of the [MBT]." *IBM*, 496 Mich at 659.

7. In response to the *IBM* decision, the Legislature enacted 2014 PA 282, which retroactively repealed the Compact to the start date of the MBT. 2014 PA 282 therefore eliminated the three-year window the *IBM* Court stated was created by 2011 PA 40.

8. In general, it is constitutional for tax statutes to be retroactively amended, and taxpayers do not generally have a vested interest in tax laws that exist at any particular moment. *United States v Carlton*, 512 US 26, 30; 114 S Ct 2018; 129 L Ed 2d 22 (1994).

With these principles and facts in mind, we now turn our attention to the precise arguments put forth by the parties.

C. STATE AND FEDERAL CONTRACTS CLAUSES

We first address whether repeal of the Compact through 2014 PA 282 violated the Contracts Clauses of the state and federal Constitutions. The United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," US Const, art I, § 10, cl 1, while our state Constitution similarly provides that "[n]o . . . law impairing the obligation of contract shall be enacted," Const 1963, art 1, § 10. In conducting this constitutional review, we give deference to the legislative branch by presuming statutes to be constitutional, and we will construe statutes as constitutional unless their unconstitutionality is clearly apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). This presumption is " 'especially strong' " when tax legislation is concerned. *Id*. at 308 (citation omitted).

Like many provisions of the federal Constitution, the Contracts Clause has not been applied by the Supreme Court according to its plain, unequivocal

language. As that Court has acknowledged, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983), quoting *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 434; 54 S Ct 231; 78 L Ed 413 (1934). In order to determine whether the clause's prohibition should be accommodated, the Supreme Court developed a three-part test. The first part of the three-part test is "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992), quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

Whether a change in state law has resulted in "a substantial impairment of a contractual relationship" itself requires consideration of three factors: "[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial." *Romein*, 503 US at 186. If this first prong of the test is met, i.e., "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . ." *Energy Reserves Group*, 459 US at 411. Finally, the third part of the test is "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id*. at 412 (citation and quotation marks omitted;

alterations in original). See also *Borman LLC v 18718 Borman, LLC*, 777 F3d 816, 824-825 (CA 6, 2015).[4]

We agree with the trial court that the Compact is not a binding contract under Michigan law. Because Congress did not approve the Compact, Michigan law governs its interpretation. See *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (stating that where the consent of Congress is not obtained, a compact does not express federal law and must be construed as state law). The trial court provided the following analysis of the Compact under Michigan law, with which we are in full agreement:

> In Michigan, there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). "In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id*. at 662 (quotation marks and citation omitted). As noted in the dissent in *IBM*, "[t]his presumption is grounded in the principle that 'surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.' " *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.
>
> There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court's recognition of "the basic principle[] that the States have wide

[4] Lower federal court decisions are not binding on this Court but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

> latitude in the selection of apportionment formulas . . . ." *Moorman* [*Mfg Co v Blair*], 437 US [267,] 274[; 98 S Ct 2340; 57 L Ed 2d 197 (1978)]. This interpretation is also consistent with the Court's recent acknowledgement that states "do not easily cede their sovereign powers . . . ." *Tarrant* [*Regional Water Dist v Herrmann*], [569 US ___, ___] 133 S Ct [2120,] 2132 [186 L Ed 2d 153 (2013)]. Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, the Court concludes that no contractual obligation was created by enactment of 1969 PA 343 that would prohibit the enactment of [2014] PA 282.

See also *IBM*, 496 Mich at 683 (MCCORMACK, J., dissenting) (opining that the Compact's withdrawal provision was "strong evidence that the member states did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation"). Accordingly, plaintiffs' state and federal Contracts Clause arguments are unavailing because they are premised on the incorrect view that the Compact comprises a binding contract under state law.[5] See *Romein*, 503 US at 186.

However, plaintiffs also argue, using law developed under the federal Compact Clause, US Const, art I,

[5] We also point out that because a Legislature cannot bind a subsequent Legislature under Michigan law, 1969 PA 343 did not restrict a subsequent Legislature's ability to correct an error prospectively or retroactively. See, e.g., *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). See also *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937) ("The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.").

§ 10, cl 3,[6] that Michigan created binding contractual obligations by entering into the Compact and that those binding obligations are enforceable under the Contracts Clause. See, e.g., *Thompson v Auditor General*, 261 Mich 624, 636; 247 NW 360 (1933), citing *Green v Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1823); *Doe v Ward*, 124 F Supp 2d 900, 915 n 20 (WD Penn, 2000), quoting *Aveline v Pennsylvania Bd of Probation & Parole*, 729 A2d 1254, 1257 n 10 (Pa, 1999). Relying upon caselaw addressing whether an agreement between two or more states constitutes a compact for purposes of the Compact Clause, in its own words the trial court considered "[t]he three 'classic indicia' of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal." See *Northeast Bancorp, Inc v Bd of Governors of the Fed Reserve Sys*, 472 US 159, 175; 105 S Ct 2545; 86 L Ed 2d 112 (1985), and *Seattle Master Builders Ass'n v Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Applying these same factors, we conclude that the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause.

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[6] Plaintiffs do not allege a violation of the Compact Clause, and for good reason. According to the Supreme Court, the Compact Clause is limited to "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' " *US Steel*, 434 US at 471, quoting *Virginia v Tennessee*, 148 US 503, 519; 13 S Ct 728; 37 L Ed 537 (1893). The Compact does nothing of the sort, and essentially exists for the benefit of multistate taxpayers. It gives no advantage to the states vis-à-vis the federal government.

With respect to the first factor, whether the Compact created a joint regulatory agency, although the Compact created the Multistate Tax Commission, former MCL 205.581, art VI, it did not confer any governing or regulatory powers on that body. Rather, the Commission's powers included studying state and local tax systems, developing and recommending proposals for greater uniformity, and compiling information helpful to the party states. Former MCL 205.581, art VI(3). As the trial court noted, "[n]one of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to tax," a point the Court in *US Steel Corp*, 434 US at 473, also made clear:

> [The Compact] does not purport to authorize the member States to exercise any powers they could not exercise in its absence. *Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission*. [Emphasis added.]

Concerning the second factor, we adopt the trial court's analysis and its conclusion that the Compact did not require reciprocal action:

> There is nothing reciprocal about the Compact's provisions. Each member state operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV's application in one member state has no bearing on another state. And the functionality of one member state's apportionment methodology does not hinge on whether another member state's apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co* [437 US at 274], "the States have wide latitude in the selection of apportionment formulas." Consistent with *Moorman*, a Member State's decision to allow or eliminate a certain

> apportionment formula is unaffected by the choice of formula that another member state has made.

Finally, with regard to the third factor, the Compact allows unilateral modification and withdrawal. The Compact expressly says that member states are free to withdraw unilaterally without notice to other member states. As previously noted, former MCL 205.581, art X(2), provides that a state may withdraw from the Compact by enacting a statute repealing it. See also *US Steel Corp*, 434 US at 473 ("[E]ach State is free to withdraw at any time."). Because the Compact specifically allows member states to unilaterally withdraw (subject to one condition, discussed later in this opinion) by merely passing legislation doing so, which is precisely what Michigan did through 2014 PA 282, we hold that the Compact was not a binding agreement on this state. Instead, it was an advisory agreement that was agreed to by participating states as a means of addressing interstate business taxation and threatened federal intervention into that area. 2014 PA 282, which removed the state as a member of the Compact, was therefore not prohibited.[7]

Before concluding on this issue, we point out that even if there was a binding contractual commitment on the part of the state, there likely would still be no violation of the Contracts Clause. The United States Court of Appeals for the Sixth Circuit recently stated that "an impairment takes on constitutional dimen-

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[7] We also point out, as did Justice MCCORMACK in her *IBM* dissent, that the member states' course of performance shows that unilateral amendments or withdrawals had long been accepted. As Justice MCCORMACK noted, "member states did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members." *IBM*, 496 Mich at 681-682 (MCCORMACK, J., dissenting).

sions only when it interferes with reasonably expected contractual benefits." *Borman LLC*, 777 F3d at 826, citing *US Trust Co of New York v New Jersey*, 431 US 1, 21, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). As the Supreme Court has previously declared, "a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983). Given the fact that these taxpayers have no vested interest in the continuation of a tax law, and that tax law is one of the more highly regulated areas in the law, it is difficult to see what reasonable expectation was actually interfered with. See, e.g., *All Star, Inc v Georgia Atlanta Amusements, LLC*, 332 Ga App 1, 9; 770 SE2d 22 (2015), and cases cited therein. This is particularly so when considering Treasury's position on this issue over the past five years or so.

In any event, because the Compact is not binding, either as a contract or a compact, it is subject to Michigan law concerning the interpretation of statutes.

D. RETROACTIVITY AND THE DUE PROCESS CLAUSES

We hold, as did the trial court, that the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal Constitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself.

In confronting these issues it is certainly worth repeating that "[s]tatutes are presumed to be constitutional, and this presumption is especially strong with respect to tax legislation. The party challenging the constitutionality of the statute has the burden of

proving the law's invalidity." *Gen Motors Corp*, 290 Mich App at 369 (citations omitted). In *Gen Motors Corp* we noted that the Due Process Clause of the Fourteenth Amendment has been read by the Supreme Court to contain a substantive component even though the clause itself contains only a procedural component:

> The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Although textually only providing procedural protections, the Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. But to be protected by the Due Process Clause, a property interest must be a vested right. A vested right is an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. [*Id*. at 370 (citations and quotation marks omitted).]

Both the federal courts and our state courts have uniformly held that the retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means. For example, in *Welch v Henry*, 305 US 134, 146-151; 59 S Ct 121; 83 L Ed 87 (1938), the United States Supreme Court rejected a due process challenge to a Wisconsin statute enacted in 1935 that imposed a tax on income received in 1933. The Supreme Court explained that "a tax is not necessarily unconstitutional because retroactive." *Id*. at 146. It further concluded:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from

> that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Id*. at 146-147.]

In order to resolve this issue, it is necessary "[i]n each case . . . to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id*. at 147.

Carlton, 512 US 26, involved a due process challenge to the retroactive application of a 1987 amendment of a federal tax law to a taxpayer's transactions that occurred in 1986. The Supreme Court noted that it "repeatedly has upheld retroactive tax legislation against a due process challenge." *Carlton*, 512 US at 30. In addressing the "harsh and oppressive" language in *Welch*, the Court explained that "[t]he 'harsh and oppressive' formulation . . . does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy." *Id*. (citation and quotation marks omitted). That is, if the retroactive application of a statute is supported by a legitimate legislative purpose that is furthered by rational means, then the wisdom of the legislation is a determination left *exclusively* to the legislative and executive branches. *Id*. at 30-31. Once the relatively easy two-part test is met, a court has no further business addressing any policy implications emanating from the statute.

Carlton makes clear that a taxpayer's reliance on a view of the law—even a correct view of the law—does not prevent the Legislature from retroactively amending a statute. In *Carlton*, the 1987 amendment was adopted as a curative measure because the tax

provision adopted in 1986 failed to require that a decedent must have owned the stock in question in order for the decedent's estate to qualify for the deduction. *Id*. at 31. "As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an [employee stock ownership plan (ESOP)], thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation." *Id*. Congress did not contemplate such a broad application of the deduction when it was originally enacted in 1986. *Id*. In rejecting the taxpayer's due process challenge to the retroactive application of the 1987 amendment, the Supreme Court reasoned:

> We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress'[s] purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable. [*Id*. at 32.]

The *Carlton* Court explained that Congress had acted promptly and established only a modest period of retroactivity. *Id*. The Court took note of the customary congressional practice of giving general revenue statutes effective dates that precede the dates of actual

enactment, confined to short and limited periods related to the practicalities of producing national legislation. *Id*. at 32-33.

In *Carlton*, "the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year." *Id*. at 33. Although it was uncontested that the taxpayer in *Carlton* had relied on the original 1986 version of the tax statute when engaging in stock transactions in December 1986, and the reading of the original statute on which the taxpayer relied appeared to have been correct, the taxpayer's reliance alone was insufficient to establish a due process violation. *Id*. "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id*. And, the 1987 amendment did not impose "a wholly new tax." *Id*. at 34 (quotation marks omitted). Because the retroactive application of the 1987 amendment was rationally related to a legitimate legislative purpose, the Court held that the amendment as applied to the taxpayer's 1986 transactions comported with due process. *Id*. at 35.

Michigan law is, of course, in accord. In *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994), our Supreme Court noted that "[t]he concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts."

> A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. Nonetheless, when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. [*Id*. at 699 (citations omitted).]

A vested right is a legal or equitable title to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand by another. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009). To be vested, a right must be more than a mere expectation based on an anticipated continuance of the present laws. *Id*. Relative to taxpayers, the *Walker* Court—just like the United States Supreme Court in *Carlton*—held that "it is also well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law." *Walker*, 445 Mich at 703. Not surprisingly, we have more recently held, consistently with *Walker*, that

> a vested right cannot be premised on an expectation that general laws will continue *and certainly cannot be premised on the continuation of tax law*. In light of the fact that plaintiffs did not have a vested right, the contention that due process rights were violated is simply without merit. [*GMAC*, 286 Mich App at 378.]

Likewise, in *Gen Motors Corp*, 290 Mich App at 371, we held that the plaintiff's "claim for a refund of use taxes it paid was not a vested right but rather a mere expectation that its claim might succeed in light of" an earlier decision of this Court. The plaintiff's "claim rest[ed] on the theory that it held a vested chose in action—its refund claim—and relies on cases involving rights of action for damages to property or personal injury." *Id*. But, this Court noted, the case before it involved a tax rather than a right of action, and the plaintiff, "as a taxpayer, does not have a vested right in a tax statute or in the continuance of any tax law." *Id*. This Court concluded that the Legislature had not acted illegitimately by enacting a statute for the purpose of reversing a decision of this Court because the

statute did not reverse a judicial decision or repeal a final judgment. *Id*. at 372-373. Stating the obvious, we said that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted." *Id*., citing *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation."). "A legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.' " *Gen Motors Corp*, 290 Mich App at 373, quoting *Carlton*, 512 US at 35.

In *Gen Motors Corp*, 290 Mich App at 376, the retroactive application of the statute did not exceed the "modesty limitation" of the Due Process Clause, as the statutory amendment did not reach back in time to assess a wholly new tax on long-concluded transactions. Rather, it confirmed a tax that had been assessed and paid for many years. *Id*. Quite similar to this case, the Legislature acted promptly in response to this Court's earlier decision by correcting what might have resulted in a significant loss of revenue. *Id*. This Court reasoned that "the nominal period to which the amendment retrospectively applies—five years—cannot be said to extend beyond the taxpayers' interest in finality and repose because the period of retroactivity is consistent with the applicable statute of limitations." *Id*. The period of retroactivity was "comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause." *Id*. at 377; see also *id*. at 377 n 3 (citing authorities in support of this proposition).

On the basis of the above authorities, we hold that the retroactive impact of 2014 PA 282 did not violate the Due Process Clauses of either the state or federal Constitutions. First, plaintiffs had no vested right in the tax laws or in the continuance of any tax laws. *Carlton*, 512 US at 33; *Walker*, 445 Mich at 703; *GMAC*, 286 Mich App at 378. Indeed, plaintiffs attempt to characterize their tax refund claims as causes of action that comprised vested interests, but that same argument was considered and rejected in *Gen Motors Corp*, 290 Mich App at 371. Plaintiffs did not have a vested interest protected by the Due Process Clause in the continuation of the Compact's apportionment provision.

Further, caselaw supports the proposition that the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282. As the trial court explained, a Senate Fiscal Agency analysis of SB 156 addressed the potential ramifications of failing to accord retroactive effect to 2014 PA 282:[8]

> The first enacting section of the bill would retroactively repeal the State's enactment of the Multistate Tax Compact, effective January 1, 2008. As a result, taxpayers filing under the MBT would not be allowed to use alternative apportionment calculations provided under the Compact when computing a Michigan tax base. While the Department of Treasury has not allowed taxpayers to use these alternative calculations, the Michigan Supreme Court's recent decision in *IBM Corp. v Department of Treasury* may enable certain taxpayers to use these calculations, and the Department estimates that approxi-

[8] Legislative bill analyses can be probative in determining the historical background leading up to the introduction of legislation, though we do not look to them for official statements of legislative intent. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 317-318; 818 NW2d 482 (2012).

> mately $1.1 billion in refunds would be paid as a result. Because MBT revenue is directed to the General Fund, these refunds would reduce General Fund revenue, and *the bill would prevent a reduction in General Fund revenue of $1.1 billion*. [Senate Legislative Analysis, SB 156, September 10, 2014, p 5 (emphasis added).]

It is legitimate legislative action to both (1) correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that misinterpretation. See *Carlton*, 512 US at 32 (finding a legitimate legislative purpose for the retroactive application of tax legislation meant to correct what Congress reasonably viewed as a mistake in earlier legislation "that would have created a significant and unanticipated revenue loss"), and *Gen Motors Corp*, 290 Mich App at 373 (noting that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted," and that "[a] legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as rationally related to a legitimate legislative purpose") (quotation marks and citation omitted). Accordingly, the retroactive application of 2014 PA 282 served a legitimate governmental purpose.

The retroactive application of 2014 PA 282 was likewise a rational means to further these legitimate purposes. Four factors are relevant in this determination. First, like the statutes in *Carlton* and *Gen Motors Corp*, 2014 PA 282 "does not reach back in time to assess a 'wholly new tax' on long-concluded transactions." *Gen Motors Corp*, 290 Mich App at 376. Rather, 2014 PA 282 clarifies the method of apportioning the tax base for a previously enacted tax, the MBT, by

confirming that the single-factor apportionment method must be utilized and that the three-factor method may not be elected. Second, plaintiffs, as a matter of law, could not have relied on the availability of the three-factor apportionment method. As discussed, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, and states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. And, factually, plaintiffs either were—or should have been—aware that the state (through Treasury) had been arguing since at least 2011 (and even then relative to the 2008-2009 tax years) that the apportionment provision in the Compact was no longer available. See *Int'l Business Machines Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No 306618), rev'd by *IBM*, 496 Mich 642.

Third, there is no doubt that the Legislature acted promptly to correct the error. As the trial court found, "[n]ot until July 14, 2014, when the [Supreme] Court decided *IBM*, was it made clear to the Legislature that 2007 PA 36 was defective. SB 156, H-1, which added the retroactive repeal of the Compact[] provisions, was introduced on September 9, 2014, and was enacted into law on September 11, 2014." Fourth, the 6½-year retroactive period was sufficiently modest relative to the time frames of other retroactive legislation that have been upheld by Michigan courts, federal courts, and other state courts. See *Gen Motors Corp*, 290 Mich App at 376-377 (upholding a five-year retroactive ap-

plication), and at 377 n 3 (citing caselaw from Michigan and other jurisdictions approving similar retroactive periods); *GMAC*, 286 Mich App at 378 (affirming a seven-year retroactive period). These factors squarely lead to the conclusion that the retroactive application of 2014 PA 282 was a rational means of furthering legitimate governmental purposes.

Some plaintiffs rely on *Newsweek, Inc v Florida Dep't of Revenue*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998), contending that Michigan engaged in a "bait and switch" by enticing foreign companies to engage in commerce in Michigan by providing the three-factor apportionment formula and then retroactively taking away this apportionment method. But reliance on *Newsweek* is misplaced. In *Newsweek*, 522 US at 444, the Supreme Court held that a state could not engage in a "bait and switch" by holding out what appeared to be a clear and certain remedy, i.e., a tax appeal that could be pursued after paying disputed taxes, and then later declare that no such remedy exists. (Quotation marks omitted.) Here, however, Michigan has not taken away any procedure for seeking a refund, nor has any procedural remedy been denied. Instead, the Michigan Legislature has done what legislatures across the country have had to do—clarify through statutory amendment the intended meaning of a statutory provision that had been misread by the courts. Further, Michigan never engaged in a "bait and switch" because it never suggested that the three-factor method of apportionment under the Compact could not be altered. To the contrary, the Compact expressly indicated a member state *could unilaterally* get out of the Compact at any time, and as we just emphasized, Michigan has consistently maintained that the three-factor apportionment method could not be used under the MBT Act, as reflected in the litiga-

tion in *IBM*, 496 Mich 642.[9] The retroactive provisions of 2014 PA 282 were not enacted in violation of the state or federal Due Process Clauses.

Plaintiffs also argue that retroactive withdrawal from the Compact is prohibited by 1969 PA 343, art X(2),[10] which states that a party state may, by enacting a statute, withdraw from the Compact but that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." According to plaintiffs, retroactive withdrawal is nonsensical because Michigan *participated* under the Compact in the period from 2008 through 2010 by paying dues, voting, participating in Commission leadership and meetings, and exchanging confidential taxpayer information. However, plaintiffs have failed to provide any authority establishing the relevancy of such evidence, and since the statutory and constitutional issues raised are legal issues, *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) ("We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute."), we fail to see how Michigan's participation in the Commission impacts the legal import of the statute. Accordingly, we are unconvinced by plaintiffs' contention that Michigan's alleged participation in the Commission during the relevant time frame affects the question whether 2014 PA 282 retroactively repealed the Compact provisions.

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[9] Some plaintiffs suggest that the retroactive application of 2014 PA 282 violates Michigan caselaw setting forth rules regarding retrospective legislation. This unpreserved argument fails because plaintiffs lacked a vested interest in the continuance of tax laws and in a tax refund based on the continuation of the Compact election provisions.

[10] See also former MCL 205.581, art X(2).

E. SEPARATION OF POWERS

We now turn our attention to the argument that retroactive application of 2014 PA 282 violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2 states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "Simply put, legislative power is the power to make laws. By contrast, a defining aspect of judicial power is the interpretation of law." *People v Konopka (On Remand)*, 309 Mich App 345, 361; 869 NW2d 651 (2015) (quotation marks and citation omitted).

There is little doubt that the Legislature lacks authority to reverse a judicial decision or to repeal a final judgment, *Wylie v Grand Rapids City Comm*, 293 Mich 571, 582; 292 NW 668 (1940); *Gen Motors Corp*, 290 Mich App at 372-373, but there is also little doubt that it has the authority—if not the obligation—to amend a statute that it believes has been misconstrued by the judiciary, *Romein v Gen Motors Corp*, 436 Mich 515, 537; 462 NW2d 555 (1990), aff'd 503 US 181 (1992); see also *Gen Motors Corp*, 290 Mich App at 373 (stating that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted"). This power to amend includes the power to retroactively correct the judiciary's misinterpretation of legislation:

> [The Legislature possesses the] authority to retroactively amend legislation perceived to have been misconstrued by

> the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and *so long as the retroactive provisions of the statute do not impair final judgments*.
>
> Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments. In *Seese v Bethlehem Steel Co*, 168 F2d 58, 62 (CA 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power[.] [*Romein*, 436 Mich at 537 (emphasis altered; citation omitted).]

See also *Konopka*, 309 Mich App at 361-365 (finding no separation of powers violation where the Legislature retroactively amended a statute that was perceived to have been misconstrued by the judiciary); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

There are several reasons why the Legislature did not violate the Separation of Powers Clause by retroactively repealing the Compact to January 1, 2008, thereby obviating the *IBM* Court's legal conclusions. First, 2014 PA 282 did not reverse a judicial decision or repeal a final judgment. In *IBM*, 496 Mich at 645, 658-659, 662 (opinion by VIVIANO, J.), the lead opinion held that *2007 PA 36* did not implicitly repeal the Compact's election provision. 2014 PA 282 did not overturn that judicial interpretation of the 2007 law. Instead, the Legislature created a new law, not interpreted by the *IBM* Court, that explicitly repealed the Compact provisions effective January 1, 2008, to fur-

ther what the Legislature understood to have been its original intent when it enacted 2007 PA 36. This did not impinge on the judiciary's role of interpreting the law but instead corrected a mistake that was made clear by the holding in *IBM*. That is, the Legislature in 2014 PA 282 *explicitly* repealed the Compact provisions after the holding in *IBM* revealed that the Compact election provision had not been *implicitly* repealed by the enactment of 2007 PA 36. Although 2014 PA 282 may have rendered moot the effect of the judicial interpretation in *IBM*, this did not overturn that Court's judgment and did not violate the Separation of Powers Clause. See *Romein*, 436 Mich at 537 (citing with approval a federal case "reason[ing] that the Legislature's enactment of a retroactive statute repealing *the effects of a prior judicial decision* is not an exercise of judicial power"); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

Some plaintiffs cite *Presque Isle Twp Bd of Ed v Presque Isle Co Bd of Ed*, 364 Mich 605, 612; 111 NW2d 853 (1961), for the proposition that a legislative body may not declare what its intention was on a former occasion such that it would affect past transactions. Although *Presque Isle* cited a Wisconsin case[11] that contained this language, the actual holding in *Presque Isle* was the unremarkable proposition that one legislator's present recollection of what he intended when a bill was passed could not be received in evidence for use in interpreting a statute. *Id*. The holding in *Presque Isle* is inapplicable to this issue.[12]

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[11] *Northern Trust Co v Snyder*, 113 Wis 516; 89 NW 460 (1902).

[12] Plaintiffs also contend that the 2014 Legislature could not declare the intent of the Legislature in 2007 because only 15% of the members

Finally, plaintiffs proclaim that they are entitled to the benefit of the *IBM* Court's ruling as to the effect of 2007 PA 36. They are wrong. Instead, it is well settled that our duty as an appellate court is to apply the most recent legislative pronouncement on an issue pending before this Court when the Legislature makes the new law or amendment retroactive. As stated by the United States Supreme Court:

> It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. [*Plout v Spendthrift Farm, Inc*, 514 US 211, 226-227; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (citations omitted).]

2014 PA 282 did not declare what the law was as to any final judgment, as each of these cases was pend-

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of the 2014 Legislature were members of the 2007 Legislature. We have been presented with no authority stating that the composition of the Legislature affects whether it may clarify its original intent in enacting a prior law, *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995) (stating that a party may not leave it to the Court to search for authority to sustain or reject the party's position), and cannot square that purported rule with the overwhelming caselaw recognizing the Legislature's power to correct what it perceives to be an incorrect interpretation of a statute.

ing[13] when the statute was passed. In other words, none of these cases had a judgment that was "frozen," *King v McPherson Hosp*, 290 Mich App 299, 306; 810 NW2d 594 (2010) (quotation marks and citations omitted), and so it was constitutionally permissible to apply 2014 PA 282 to these pending cases.

For all these reasons, we hold that the Legislature did not violate the Separation of Powers Clause of the state Constitution when it enacted 2014 PA 282.

F. COMMERCE CLAUSE

We next turn to plaintiff's argument that 2014 PA 282 violates the Commerce Clause of the United States Constitution.

The Commerce Clause, US Const, art I, § 8, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of any action by Congress, the Supreme Court has greatly expanded this Clause to include "a negative sweep" by "prohibit[ing] certain state actions that interfere with interstate commerce." *Quill Corp v North Dakota*, 504 US 298, 309; 112 S Ct 1904; 119 L Ed 2d 91 (1992). According to the Court, the Commerce "Clause prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Id*. at 312 (citations omitted).

> The United States Supreme Court . . . has established a four-pronged test to determine whether a state tax

[13] Although International Business Machines is a party to these appeals, its tax appeal from the 2008 tax year—the tax year subject to the Supreme Court's 2014 *IBM* decision—is not at issue here.

> violates the Commerce Clause. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). A state tax will withstand scrutiny under a Commerce Clause challenge and will be held to be constitutionally valid under the four-pronged test articulated in *Complete Auto* provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. [*Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415; 488 NW2d 182 (1992).]

Only the third prong is challenged in this case; plaintiffs contend that 2014 PA 282 discriminates against interstate commerce. "A tax violates the third prong of the *Complete Auto* test if it is facially discriminatory, has a discriminatory purpose, *or* has the effect of unduly burdening interstate commerce." *Caterpillar*, 440 Mich at 422, citing *Amerada Hess Corp v New Jersey Dep't of Treasury*, 490 US 66, 75; 109 S Ct 1617; 104 L Ed 2d 58 (1989).

We hold that 2014 PA 282 does not discriminate against or unduly burden interstate commerce. First, 2014 PA 282 is not facially discriminatory. A tax statute is facially discriminatory if there is "an explicit discriminatory design to the tax." *Amerada Hess*, 490 US at 76. 2014 PA 282 does not, on its face, create any classification based on a taxpayer's state of origin or the location of commerce. Rather, it repeals the Compact and eliminates the provision allowing election of a three-factor apportionment formula for *all* taxpayers, both in-state and out-of-state companies. Therefore, 2014 PA 282 does not reflect an explicit discriminatory design, and no facial discrimination occurred.

Second, 2014 PA 282 does not have a discriminatory purpose. A discriminatory purpose may be found, for example, where a tax statute "was motivated by an

intent to confer a benefit upon local industry not granted to out-of-state industry . . . ." *Amerada Hess*, 490 US at 76. 2014 PA 282 states that it was enacted to express the original intent of the Legislature to eliminate the election provision for purposes of the MBT Act and the Income Tax Act, as well as to protect state revenues. Senate Legislative Analysis, SB 156, September 10, 2014, pp 3-5. There is no evidence of a legislative intent to give a benefit to local industry that is denied to out-of-state businesses. Indeed, 2014 PA 282 puts in- and out-of-state corporate taxpayers *in the same position* relative to Michigan tax calculations.

There is a contention by some that a discriminatory purpose is reflected in comments made by certain legislators to the media, but as we have said, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 609 n 18; 580 NW2d 817 (1998); *Detroit Pub Sch Bd of Ed v Romulus Community Sch Bd of Ed*, 227 Mich App 80, 89 n 4; 575 NW2d 90 (1997); *Williamston v Wheatfield Twp*, 142 Mich App 714, 719; 370 NW2d 325 (1985), citing *Presque Isle*, 364 Mich at 612. Plaintiffs identify no caselaw permitting consideration of the statements of individual legislators, particularly statements made to the media, to establish legislative intent. And in any event, the purported media comments of the legislators do not reveal any intent to discriminate against interstate commerce but, instead, are reasonably understood to reflect a desire to ensure a *level playing field* and to avoid giving an unfair advantage to out-of-state businesses. There is no evidence of a discriminatory purpose underlying the enactment of 2014 PA 282.

Third, 2014 PA 282 does not have a discriminatory effect, as it merely precludes both in-state and out-of-

state taxpayers from electing the three-factor apportionment formula previously available under the Compact. The federal Constitution does not require the use of a particular apportionment formula, and a single-factor formula is presumptively valid. See *Moorman*, 437 US at 273, which provides a good example. In *Moorman*, the Supreme Court rejected a Commerce Clause challenge to Iowa's use of a single-factor formula; the Court did not agree with the argument that Iowa's single-factor formula was responsible for an alleged duplication of taxation with Illinois, which used a three-factor formula. *Id*. at 276-281. The Court held that, in the absence of implementing legislation from Congress, the Commerce Clause did not require Iowa to compute net income under Illinois's three-factor formula. *Id*. at 277-278. The Court reasoned in part that any disparity in the tax treatment of Iowa and Illinois companies was "not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter." *Id*. at 277 n 12. The purported "discrimination" against interstate commerce was "simply a way of describing the potential consequences of the use of different formulas by the two States. These consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in either State's formula." *Id*.

Plaintiffs have not established that application of the single-factor formula required by 2014 PA 282 discriminatorily affects out-of-state companies. As noted, the single-factor formula applies to *all* taxpayers, both Michigan and out-of-state companies. As with the Iowa statute in *Moorman*, 2014 PA 282 treats local and foreign companies with an equal hand by requir-

ing the single-factor formula for both. Any purported discrimination against interstate commerce is, in truth, "simply a way of describing the potential consequences of the use of different formulas by" Michigan and other states. *Moorman*, 437 US at 277 n 12. Such "consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in" the apportionment formula used by Michigan or by other states. *Id*. Plaintiffs have not established that Michigan's single-factor formula discriminates against interstate commerce. 2014 PA 282 does not violate the Commerce Clause.

G. THE FIRST AMENDMENT

Moving on to the next argument, we conclude that plaintiffs were not denied the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision.

"The right of citizens to petition their government for redress of grievances is specifically guaranteed by the United States and Michigan Constitutions." *Jackson Co Ed Ass'n v Grass Lake Community Sch Bd of Ed*, 95 Mich App 635, 641; 291 NW2d 53 (1979), citing US Const, Am I, and Const 1963, art 1, § 3. But this right "may be circumscribed to the extent necessary to achieve a valid state objective." *Jackson Co Ed Ass'n*, 95 Mich App at 642. The right to petition extends to all departments of the government and includes the right of access to the courts. *California Motor Transp Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972). See also *In re ALZ*, 247 Mich App 264, 276; 636 NW2d 284 (2001) (noting that the *California Motor Transp* Court "found a constitutional basis for the right of access to the courts as an aspect of the First Amendment right of petition"); *Mayor of Lansing v*

Knights of the Ku Klux Klan (After Remand), 222 Mich App 637, 647; 564 NW2d 177 (1997) ("The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs.").

However, the First Amendment right to advocate does not guarantee that the speech will persuade or that the advocacy will be effective. *Smith v Arkansas State Hwy Employees, Local 1315*, 441 US 463, 464-465; 99 S Ct 1826; 60 L Ed 2d 360 (1979). That is, "the First Amendment does not impose any affirmative obligation on the government to listen" or respond to the speaker. *Id*. at 465. "Nothing in the First Amendment or in [the United States Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Bd for Community Colleges v Knight*, 465 US 271, 285; 104 S Ct 1058; 79 L Ed 2d 299 (1984). See also *We The People Foundation, Inc v United States*, 376 US App DC 117, 120; 485 F3d 140 (2007) (rejecting the plaintiffs' contention "that they have a right under the First Amendment to receive a government response to or official consideration of a petition for a redress of grievances").

Further, legislative retraction of the only remedy available to a decision-maker is different from interference with the plaintiffs' abilities to express their views to the decision-maker. Thus, such a retraction does not violate the right to petition the government. *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 336; 788 NW2d 842 (2010) (finding no denial of lenders' right of access to courts in a 42 USC 1983 case, stating that "[p]laintiff cannot claim that a violation of 42 USC

1983 occurred simply because a newly enacted statute precluded recovery of certain damages that plaintiff's members had become accustomed to receiving in [non-sufficient funds] cases"). Accord *American Bus Ass'n v Rogoff*, 396 US App DC 353, 360; 649 F3d 734 (2011).

Plaintiffs assert that, in rejecting their argument, the trial court erred in relying on cases addressing the right to be heard by the Legislature; plaintiffs say they are instead contending that they were "thrown out of court." As a result of the enactment of 2014 PA 282, plaintiffs contend that they have been denied the right to petition Treasury and to appeal to a court for a refund of taxes already paid. Plaintiffs characterize this as a classic denial of the right to petition and rely on *Flagg v Detroit*, 715 F3d 165, 174 (CA 6, 2013), to argue that they have established the elements necessary to establish a denial of access to the courts.

In *Flagg*, the court observed that the United States "Supreme Court has recognized a constitutional right of access to the courts, whereby a plaintiff with a nonfrivolous legal claim has the right to bring that claim to a court of law." *Id*. at 173, citing *Christopher v Harbury*, 536 US 403, 415 n 12; 122 S Ct 2179; 153 L Ed 2d 413 (2002). The right to access the courts does not create substantive rights; a plaintiff claiming a denial of access "must have an arguable, nonfrivolous underlying cause of action." *Flagg*, 715 F3d at 173. The *Flagg* court explained:

> Denial of access to the courts claims may be forward-looking or backward-looking. In forward-looking claims, the plaintiff accuses the government of creating or maintaining some frustrating condition that stands between the plaintiff and the courthouse door. The object of the suit is to eliminate the condition, thereby allowing the plaintiff, usually an inmate, to sue on some underlying legal claim. In backward-looking claims, such as those at issue

> in the instant case, the government is accused of barring the courthouse door by concealing or destroying evidence so that the plaintiff is unable to ever obtain an adequate remedy on the underlying claim. Backward-looking claims are much less established than forward-looking claims, but this Court has recognized them and the Supreme Court has provided additional guidance as to the elements of a viable backward-looking claim. [*Id*. (citations and quotation marks omitted).]

Relying on *Christopher*, 536 US 403, and *Swekel v City of River Rouge*, 119 F3d 1259 (CA 6, 1997), the *Flagg* court identified the "elements of a backward-looking denial of access claim: (1) a non-frivolous underlying claim; (2) obstructive actions by state actors; (3) substantial[] prejudice to the underlying claim that cannot be remedied by the state court; and (4) a request for relief which the plaintiff would have sought on the underlying claim and is now otherwise unattainable." *Flagg*, 715 F3d at 174 (citations and quotation marks omitted; alteration in original).

Plaintiffs cannot establish the second element identified in *Flagg* for a backward-looking denial-of-access claim, as there are no obstructive actions by state actors. Although plaintiffs contend that enactment of 2014 PA 282 obstructed plaintiffs' access to the courts by retroactively destroying their right to elect the three-factor apportionment formula under the Compact and preventing them from obtaining a larger tax refund, *Flagg* itself indicates that a backward-looking denial of access claim can only prevail when "the government is accused of barring the courthouse door *by concealing or destroying evidence* . . . ." *Flagg*, 715 F3d at 173 (emphasis added). There is no allegation in these cases that Treasury or any state actor has concealed or destroyed evidence. The enactment of 2014 PA 282, which retroactively repealed the Compact

and required the use of a single-factor apportionment formula, did not deny plaintiffs access to the courts. In fact, as is obvious, this very litigation demonstrates that plaintiffs have had an ample opportunity to present their arguments to the courts.[14] Legislative elimination of the right to elect the three-factor apportionment formula, and any refund on the basis of such an election, does not interfere with plaintiffs' abilities to file claims or seek refunds from the courts or Treasury. All that they have been prohibited from doing is seeking a refund under one particular formula. This does not violate the First Amendment. See *American Bus Ass'n*, 396 US App DC at 360; *Mich Deferred Presentment Servs Ass'n, Inc*, 287 Mich App at 336.

H. MISCELLANEOUS STATE CONSTITUTIONAL PROVISIONS

Despite plaintiffs' protests to the contrary, the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution.

1. TITLE-OBJECT

Const 1963, art 4, § 24 provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

2014 PA 282 contains the following title:

> AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition,

[14] Like any other citizen, plaintiffs had the ability under the First Amendment to voice any objection to the Legislature or Governor before 2014 PA 282 was passed and signed into law.

> levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and 208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by adding section 508; and to repeal acts and parts of acts.

This Court has explained:

> When assessing a title-object challenge to the constitutionality of a statute, all possible presumptions should be afforded to find constitutionality. An amended title should be construed reasonably, not narrowly and with unnecessary technicality. The goal of the Title-Object Clause is notice, not restriction, of legislation, and it is only violated where the subjects are so diverse in nature that they have no necessary connection. The purpose of the clause is to prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. [*Lawnichak v Dep't of Treasury*, 214 Mich App 618, 620-621; 543 NW2d 359 (1995) (citations omitted).]

Three types of challenges may be asserted under the Title-Object Clause:

> (1) a "title-body" challenge, which indicates that the body exceeds the scope of the title, (2) a "multiple-object challenge," which indicates that the body embraces more than one object, and (3) a "change of purpose challenge," which indicates that the subject matter of the amendment is not germane to the original purpose. [*Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002).]

All three types of challenges have been raised in these cases.

We agree with the trial court that plaintiffs' multiple-objects challenge is devoid of merit. "The body of the law, and not just its title, must be examined to determine whether the act embraces more than one object. The purpose of the single-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 557; 595 NW2d 176 (1999) (citations and quotation marks omitted). "The object of the legislation must be determined by examining the law as enacted, not as originally introduced." *People v Kevorkian*, 447 Mich 436, 456; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.). "The object of a law is defined as its general purpose or aim. The constitutional requirement should be construed reasonably and permits a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Gen Motors Corp*, 290 Mich App at 388 (citations and quotation marks omitted). "Legislation should not be invalidated merely because it contains more than one means of attaining its primary object." *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499; 378 NW2d 402 (1985). "The Legislature may enact new legislation or amend any act to which the subject of the new legislation is germane, auxiliary, or incidental. A statute may authorize the doing of all things that are in furtherance of the general purpose of the act without violating the one-object limitation of art 4, § 24." *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 564; 492 NW2d 246 (1992) (citations and quotation marks omitted), overruled in part on other grounds by *Silverman v Univ of Mich Bd of Regents*,

445 Mich 209 (1994), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763 (2003).

In *Mooahesh*, this Court quoted from a prior opinion of this Court that summarized the single-object requirement in a case concerning the repeal of a tax:

> It might have been better draftsmanship to have placed the provision concerning the taxability of municipal transportation utilities in the general property tax law (where one might expect to find it) rather than in the home rule act. There is, however, no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. *The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended*. [*Mooahesh*, 195 Mich App at 564, quoting *Detroit Bd of Street R Comm'rs v Wayne Co*, 18 Mich App 614, 622-623; 171 NW2d 669 (1969).]

The trial court in *Mooahesh* found that 1988 PA 516, which amended the Income Tax Act to provide that lottery winnings are taxable, violated the Title-Object Clause because it repealed a section of the Lottery Act containing a tax exemption for lottery winnings, which the trial court viewed as an object distinct from the general object of raising revenue. *Mooahesh*, 195 Mich App at 562. This Court reversed that determination, noting that the object of 1988 PA 516 was to raise revenue, *id*. at 565, and that "[t]he object of such an act is necessarily broad-ranging and comprehensive." *Id*. at 566 (citation and quotation marks omitted).

> Revenues can be raised in any number of ways, as history has made obvious. Taxes may be imposed, in-

> creased, or rearranged. The object of meet[ing] deficiencies in state funds may reasonably be found to include the repeal of a tax exemption, even if that exemption does not appear in any act specifically devoted to taxation. While it might have been better draftsmanship to have provided for a separate amendment to the Lottery Act, the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement. [*Id*. (citations and quotation marks omitted; alteration in original).]

In rejecting plaintiffs' multiple-objects challenge in the present cases, the trial court discussed *Mooahesh* and reasoned as follows:

> Just as the statute considered in *Mooahesh* had as its general purpose the raising of revenues, so too was the general purpose of [2014] PA 282. And just as it might have been "better draftsmanship" to have provided for a separate amendment repealing § 34 of the Lottery Act, the Legislature in enacting [2014] PA 282 might have been better advised to repeal the Compact provisions in a separate act. But like the choice to amend the [Income Tax Act] and repeal a section of the Lottery Act in one act, the choice to include the repeal of the Compact and amend the MBT in one act is not a violation of the single-object requirement.

The trial court's analysis is convincing. The single object, i.e., the general purpose or aim, of 2014 PA 282 is to amend 2007 PA 36, the MBT Act. This general object was accomplished by amending provisions of the MBT Act and by repealing the Compact. This object is reflected in the title of 2014 PA 282, which refers to the amendment of certain sections of 2007 PA 36 and the repeal of acts and parts of acts. Enacting § 1 of 2014 PA 282 provides that the Compact is repealed retroactive to January 1, 2008, and provides that the repeal is intended to express the original intent of the Legislature regarding the application of a section of the MBT Act

and to eliminate the apportionment election provision in the Compact. This enacting section thus clarifies that the repeal of the Compact and the concomitant elimination of the apportionment election provision is germane to the object of amending the MBT Act in that it clarifies the appropriate method of apportionment. In other words, the Compact and the MBT Act are related to one another because they each pertain to the method of apportioning the tax base. Thus, 2014 PA 282 does not contain diverse subjects that have no necessary connection. Rather, the repeal of the Compact directly relates to, carries out, and implements the principal object of amending the MBT Act.

"With regard to a title-body challenge, this Court has indicated that the title of an act must express the general purpose or object of the act." *Wayne Co Bd of Comm'rs*, 253 Mich App at 185. "Only the general object and not all the details and incidents of a statute need be indicated in the title." *Ace Tex Corp v Detroit*, 185 Mich App 609, 616; 463 NW2d 166 (1990).

> [I]t is not necessary that a title be an index of all of an act's provisions. It is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose[.] [*City of Livonia*, 423 Mich at 501 (citations and quotation marks omitted).]

"Whether a provision is germane to its purpose depends upon its relationship to the object of the act." *Ace Tex Corp*, 185 Mich App at 616. "The test is whether the title gives fair notice to the legislators and the public of the challenged provision. The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection." *H J Tucker & Assoc, Inc*,

234 Mich App at 559 (citations and quotation marks omitted).

Again, the title of 2014 PA 282 expresses the general purpose or object of amending the MBT Act and refers to the repeal of acts or parts of acts. Although the title does not use the word "Compact," the title need not be an index of all of the act's provisions. *City of Livonia*, 423 Mich at 501. The repeal of the Compact is germane, auxiliary, or incidental to the amendment of the MBT Act because the elimination of the Compact's election provision is pertinent to the proper method of apportionment of the MBT tax base. The subjects are not so diverse in nature that they lack a necessary connection, and neither the legislators nor the public were deprived of notice of the challenged provision. See also *Mooahesh*, 195 Mich App at 569 ("Despite [1988 PA 516's] failure to state explicitly in the title that the Lottery Act exemption was being repealed, we are able to declare that the subjects are not so diverse as to have 'no necessary connection.' ").

When confronting a change-of-purpose challenge, a court must consider whether the change comprises a mere amendment or extension of the basic purpose of the original bill or instead introduces an entirely new and different subject matter. *Anderson v Oakland Co Clerk*, 419 Mich 313, 328; 353 NW2d 448 (1984). "[T]he test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose. The test of germaneness is much like the standard for determining whether a bill is limited to a single object." *Kevorkian*, 447 Mich at 461 (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (citations omitted). In *Kevorkian*, *id*. at 451-452, the bill as introduced would have created a commission

on death and dying to study " 'voluntary self-termination of life,' " but the amended bill that became law added criminal penalties for assisting another person in committing suicide. Our Supreme Court rejected a change-of-purpose challenge because the criminal penalties were an interim measure that provided a stable environment while the commission, the Legislature, and the citizenry studied the matter further. *Id*. at 461; *id*. at 497 (BOYLE, J., concurring in part); *id*. at 511-512 (LEVIN, J., concurring in part); *id*. at 524 (MALLETT, J., concurring in part).

With respect to 2014 PA 282, both the original and amended bill contained provisions related to the MBT tax base. The original purpose of SB 156 was to amend the MBT Act in various ways, including by enacting amendments concerning the gross-receipts tax base under the MBT. The change implemented by substitute H-1, as enrolled as 2014 PA 282, did not introduce an entirely new and different subject matter. Instead, it amended or extended the basic purpose of the original bill by retaining the original amendments and adding other provisions, including language retroactively repealing the Compact provisions and expressing legislative intent concerning the use of the single-factor apportionment formula and the elimination of the Compact's election provision. This was germane to the original purpose of amending the MBT Act because, as discussed, the elimination of the Compact's election provision was pertinent to the proper method of apportionment under the MBT Act. Therefore, the repeal of the Compact was sufficiently interconnected with the MBT Act that it fell within the basic purpose of the original bill. This was a far cry from the introduction of an entirely new and different subject matter, as in *Toth v Callaghan*, 995 F Supp 2d 774, 778 (ED Mich, 2014), where a bill that began by allowing

emergency managers to reject, modify, or terminate collective bargaining agreements ended up being passed as a bill that excluded graduate student research assistants from the definition of "public employee."

2. THE FIVE-DAY RULE

Plaintiffs have also failed to establish a violation of the Five-Day Rule. Const 1963, art 4, § 26 provides, in relevant part: "No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days."

> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule.
>
> Whether measured by the title of the act or by the title and contents of the act, the five-day rule could be rendered ineffective without a change of purpose provision. It is equally clear that a change of purpose rule standing alone would be meaningless, because any time the purpose of a bill was changed it would be a new bill which could be passed immediately. In sum, the alteration of purpose provision operates as an ultimate limitation to prevent evasion of the five-day rule. [*Anderson*, 419 Mich at 329-330.]

"A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit." *Id*. at 329.

The legislative record establishes that SB 156 was before each house for at least five days. And as discussed earlier, there was no change of the original bill's purpose. Accordingly, no violation of the Five-Day Rule occurred.

3. DISTINCT-STATEMENT CLAUSE

Finally, plaintiffs have not established a violation of the Distinct-Statement Clause. Const 1963, art 4, § 32, provides: "Every law which imposes, continues or revives a tax shall distinctly state the tax." The purpose of this provision "is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007) (opinion by WILDER, P.J.) (citations, quotation marks, and emphasis omitted). The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax. *Dukesherer Farms, Inc v Dep't of Agriculture Dir*, 73 Mich App 212, 221; 251 NW2d 278 (1977), aff'd 405 Mich 1 (1979), such as when a tax is disguised as a regulatory fee, *Dawson*, 274 Mich App at 740. 2014 PA 282 does not impose or revive any tax, but clarifies the Legislature's intent regarding apportionment of the MBT tax base. There is nothing deceptive about the legislation. It is clear from the title and body of 2014 PA 282 that it is amending the MBT Act. There has been no violation of the Distinct-Statement Clause.

I. DISCOVERY

"[S]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no

fair chance that further discovery will result in factual support for the party opposing the motion." *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994) (citation omitted). As alluded to earlier, plaintiffs wanted to engage in discovery regarding Michigan's participation in the Commission since 2008, which according to plaintiffs would establish that the Compact was not in fact repealed retroactively beginning on January 1, 2008, because Michigan in fact participated in the Commission during the relevant time.

But as we also alluded to earlier, discovery on any of these issues would not produce relevant information. Setting aside plaintiffs' failure to cite authority regarding the relevancy of Michigan's participation in the Commission, more to the point is the fact that the issues raised concern statutory interpretation and constitutional challenges. And those issues are, as we said before, matters of law. *Elba Twp*, 493 Mich at 277-278; see also *Hunter*, 484 Mich at 257; *GMAC*, 286 Mich App at 380. How and to what extent the state participated in the Commission has no bearing on the meaning or effect of the words used in the statute or the state and federal Constitutions. Accordingly, discovery on this issue did not stand a fair chance of providing support for plaintiffs' position.

Discovery was also not required regarding the extent of plaintiffs' reliance on the Compact's election provision. As a matter of law, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, while states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax

legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. Therefore, plaintiffs have not established a fair chance that discovery on the extent of their reliance on the Compact apportionment method would have led to any relevant support for their position.

Plaintiffs also incorrectly contend that discovery should have been held regarding the Legislature's intent in enacting 2014 PA 282, including internal communications regarding the purpose of the legislation. But as we previously made clear, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski*, 457 Mich at 609 n 18; *Detroit Bd of Ed*, 227 Mich App at 89 n 4; *City of Williamston*, 142 Mich App at 719, citing *Presque Isle*, 364 Mich at 612. Hence, discovery on this issue would not have had a fair chance of producing support for plaintiffs' position.

Affirmed. No costs, an issue of public importance being involved. MCR 7.219(A).

JANSEN and METER, JJ., concurred with MURRAY, P.J.

PEOPLE v TERRELL

Docket No. 321573. Submitted September 1, 2015, at Detroit. Decided September 29, 2015, at 9:05 a.m. Leave to appeal sought.

James Anthony Terrell was convicted by jury in Wayne Circuit Court of three counts of assault with intent to do great bodily harm less than murder, and one count each of resisting or obstructing a police officer, felon in possession of a firearm (felon-in-possession), and possession of a firearm during the commission of a felony (felony-firearm). The circuit court, James A. Callahan, J., originally sentenced defendant as a fourth-offense habitual offender to prison terms of 30 to 50 years for each assault conviction, 5 to 15 years for the resisting or obstructing conviction, 2 to 5 years for the felon-in-possession conviction, and 2 years for the felony-firearm conviction. Defendant appealed. The Court of Appeals affirmed defendant's convictions in an unpublished opinion per curiam but vacated his sentences and remanded for resentencing because a conviction had been counted twice when determining defendant's habitual offender status and the trial court had failed to articulate objective and verifiable reasons for departing upward from the recommended sentence under the sentencing guidelines. The trial court resentenced defendant as a second-offense habitual offender to prison terms of 95 months to 15 years for each of the assault convictions, 1 to 2 years for the resisting or obstructing conviction, 5 to 7½ years for the felon-in-possession conviction, and 2 years for the felony-firearm conviction. Defendant moved for resentencing on the basis of errors in scoring his offense variables (OVs) and prior record variable (PRV) 7, the failure of the amended judgment of sentence to reflect a waiver of fees and costs, and the trial court's alleged vindictiveness at resentencing. The trial court denied defendant's motion for resentencing, but directed that defendant's judgment of sentence be again amended to reflect a waiver of fees and costs. Defendant appealed.

The Court of Appeals *held*:

1. Defendant's properly scored OVs exceeded the point level of OV Level VI, even if the scores for OVs 3 and 4 resulted from judicial fact-finding. Defendant claimed that OVs 3, 4, and 9 were

improperly scored according to the Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), which held that mandatory application of Michigan's statutory sentencing guidelines was unconstitutional and ruled that the guidelines were to be advisory only. Defendant argued that the scores for OVs 3, 4, and 9 were not supported by the jury's verdict and had not been admitted to by him. However, defendant's OVs totaled 70 points without the scores from OVs 3, 4, or 9. Because OV Level VI begins with an OV score of 75, if any one of the three challenged OVs were supported by the jury's verdict, defendant's OV total would exceed 75 points. Defendant's OV 9 score of 10 points was supported by the jury's verdicts because the facts showed that defendant shot at three police officers, and the verdicts of guilty on the three charges of assault with intent to do great bodily injury less than death indicated that those three police officers were "victims" under MCL 777.39(1)(c); that is, the three police officers were in danger of physical injury or death as a result of defendant's conduct. With defendant's OV 9 score, his OVs totaled 80 points and placed him at the same level of VI under which he was previously sentenced. The remaining OVs defendant challenged—OVs 3 and 4—are irrelevant under this analysis because with or without them, defendant's OV score exceeded the total number of points necessary for placement in OV Level VI.

2. The case was remanded to correct an error on defendant's amended judgment of sentence. Although the trial court waived defendant's fees and costs at defendant's first sentencing, the amended judgment of sentence ordered defendant to pay a crime victim's rights assessment and court costs. After a resentencing hearing, the trial court issued a written order directing that the amended judgment of sentence itself be amended to indicate the waiver of fees and costs. However, there was no evidence that an amended judgment of sentence was ever issued, and remand was necessary for such an amendment to be made.

3. Even when no errors in scoring a defendant's OVs or PRVs are identified, the defendant is entitled to a remand for possible resentencing under the procedure of *United States v Crosby*, 397 F3d 103 (CA 2, 2005), if the trial court was constrained by the sentencing guidelines when it imposed its sentence on the defendant. A trial court is no longer bound to impose a sentence within the guidelines range in the absence of a substantial and compelling reason for departure. Before *Lockridge*, a trial court that imposed a sentence within the guidelines range may have been constrained by the unconstitutional application of Michigan's sentencing guidelines, which are now merely advisory under *Lockridge*. According to *Lockridge*, a trial court may depart

from the guidelines range without having to articulate a substantial and compelling reason for departure, and its sentence will be reviewed for reasonableness.

4. There was no evidence of vindictiveness in the trial court's decision to resentence defendant for being a felon in possession of a firearm to a sentence more severe than the sentence it imposed at defendant's initial sentencing. The trial court rebutted the presumption of vindictiveness that arises when the same judge resentences a defendant to a sentence longer than the one first imposed because the trial court explained its reasons for imposing the longer sentence.

5. PRV 7 is properly scored when a defendant has a felony-firearm conviction provided the felony-firearm conviction is not counted as one of the concurrent or subsequent felony offenses scored under PRV 7. Defendant claimed that PRV 7 should not have been scored solely because one of his convictions was for felony-firearm. Convictions that may not be used in calculating the number of a defendant's concurrent or subsequent felony convictions under PRV 7 include felony-firearm and convictions that result in a mandatory consecutive sentence. Although defendant's felony-firearm conviction could not be used as one of the convictions on which his PRV 7 score was based, defendant was convicted of five other felonies, none of which required a consecutive sentence, and which were therefore properly considered under PRV 7.

Remanded.

Lee A. Somerville and James Anthony Terrell, *in propria persona*, for defendant.

Before: TALBOT, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. A jury convicted defendant of three counts of assault with intent to do great bodily harm less than murder,[1] and one count each of resisting or obstructing a police officer,[2] felon in possession of a firearm (felon-in-possession),[3] and possession of a firearm during the

[1] MCL 750.84(1)(a).

[2] MCL 750.81d(1).

[3] MCL 750.224f(1).

commission of a felony (felony-firearm).[4] The trial court originally sentenced defendant as a fourth-offense habitual offender[5] to prison terms of 30 to 50 years for each assault conviction, 5 to 15 years for the resisting or obstructing conviction, 2 to 5 years for the felon-in-possession conviction, and 2 years for the felony-firearm conviction. The judgment of sentence indicated that the sentence for one of the assault convictions was consecutive to the sentence for the felony-firearm conviction, which was concurrent with the remaining sentences. In a prior appeal, this Court affirmed defendant's convictions, but vacated his sentences and remanded for resentencing because of "issues regarding defendant's habitual offender status that need resolution and because of the errors associated with the sentencing departure . . . ."[6] On remand, the trial court resentenced defendant as a second-offense habitual offender,[7] to prison terms of 95 months to 15 years for each assault conviction, 1 to 2 years for the resisting or obstructing conviction, 5 to 7½ years for the felon-in-possession conviction, and 2 years for the felony-firearm conviction. The amended judgment of sentence, again, reflects that defendant's sentence for one of the assault convictions is consecutive to the sentence for the felony-firearm conviction, which is itself concurrent with the remaining sentences. Defendant again appeals as of right, challenging the sentences imposed on remand. We remand for proceedings consistent with this opinion and for correction of the amended judgment of sentence to reflect the waiver of fees and costs.

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[4] MCL 750.227b(1).

[5] MCL 769.12.

[6] *People v Terrell*, unpublished opinion per curiam of the Court of Appeals, issued September 24, 2013 (Docket No. 302135), p 17.

[7] MCL 769.10.

Defendant's convictions arise from a shootout with the Detroit police. This Court delineated the following relevant facts in its prior opinion:

> The shootout occurred after a minivan carrying defendant and his friend, Devon Gary, pulled over to the side of the road while being followed by a marked police cruiser, although the cruiser's emergency lights and siren had not been activated. The police had been following the minivan based on suspicious behavior by its occupants and suspected drunk driving. A second police vehicle, unmarked, pulled up behind the marked police cruiser. Defendant was a passenger in the minivan and, according to police testimony, defendant leaped out of the minivan's passenger-side sliding door and opened fire on police with an AK-47 assault rifle. The police officers returned fire, discharging their .40 caliber weapons 40 times based on the number of shell casings found at the scene. Gary, who was unarmed and had also exited the minivan, was shot dead and defendant was struck in the leg by a bullet, but he managed to escape.
>
> Defendant first stopped briefly at a friend's house, then stayed a few days with his girlfriend, who helped treat the wound, and defendant eventually went down to Memphis, Tennessee, where he had friends and family, and where he sought medical assistance in a hospital emergency room for the bullet wound. A month later, defendant went to Des Moines, Iowa, where he had resided off and on in past years. He was arrested in Iowa. Defendant took the stand in his own defense and admitted that he was in the minivan with Gary, who went by the name Kano, but defendant denied displaying, pointing, or firing any weapon at the police before the police started shooting. An AK-47 was found a short distance from the scene of the shootout, but well beyond the spot that Kano fell dead. Five shell casings that were not discharged from the officers' guns were found at the scene, although the expert on ballistics could not definitively connect the casings to the AK-47. DNA evidence placed defendant in the minivan, and a video captured by

> the marked police cruiser's camera showed someone exiting the minivan's sliding door carrying a weapon.
>
> The minivan involved in the incident belonged to a married couple. The husband had been at a gas pump filling the minivan's tank at a Marathon station a few hours before the shootout, while his wife was inside paying, when he was approached by two young males. The taller of the two men was wielding an AK-47 assault rifle. The husband bolted toward the gas station's entrance, yelling at the men to just take the vehicle. The rifleman then chased the husband in the direction of the gas station's front door. As the husband was entering the front door of the station in his attempt to escape the rifleman, his wife was exiting the station, and a female bystander, who had been waiting to catch a bus, was stationed near the Marathon's front door. At that moment, a gunshot was heard. The husband testified that he felt a bullet graze his jacket, and a bullet struck the female bystander, causing a minor injury. The wife escaped by running down the block. The two perpetrators then drove off in the minivan. Kano was identified by defendant's uncle as the gun-toting man seen in a video still captured by a gas station camera. The couple could not identify defendant in a lineup, nor at trial, as having participated in the crime. The bystander had also failed to identify defendant in a lineup and at the preliminary examination, although she claimed at trial that defendant, while not wielding a weapon, was the shorter man at the gas station who had been involved in the crime. Defendant denied being at the Marathon station that night and claimed that Kano gave him a ride in the minivan shortly before the shootout occurred. Defendant was acquitted of all charges arising out of the events at the gas station, either by jury verdict or directed verdict.[8]

Defendant was originally charged with three counts of assault with intent to commit murder,[9] but he was

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[8] *Terrell*, unpub op at 1-3.

[9] MCL 750.83.

convicted of three counts of the lesser offense of assault with intent to do great bodily harm less than murder.[10]

At sentencing, the prosecutor argued that the trial court should impose a sentence that exceeded the sentencing guidelines range. When imposing the sentence, the trial court, without stating that it was departing from the guidelines range, noted the "highly assaultive nature" of the offenses, defendant's lack of remorse, and defendant's inability to be rehabilitated. Thereafter, the trial court completed a guidelines departure form in which it cited defendant's lack of remorse and his inability to be rehabilitated as reasons to exceed the guidelines range, which was 38 to 152 months for each of defendant's assault with intent to do great bodily harm convictions, as enhanced for a fourth-offense habitual offender. The trial court sentenced defendant as a fourth-offense habitual offender[11] to 30 to 50 years' imprisonment for each assault conviction, 5 to 15 years' imprisonment for the resisting or obstructing conviction, 2 to 5 years' imprisonment for the felon-in-possession conviction, and a 2-year term of imprisonment for the felony-firearm conviction.[12] The trial court expressly declined to impose any costs or fees, mentioning defendant's indigent status.

On September 24, 2013, this Court affirmed defendant's convictions, but vacated his sentences and remanded for resentencing.[13] This Court concluded that the habitual offender notice erroneously counted the same previous conviction twice, and the Court re-

[10] *Terrell*, unpub op at 1.

[11] MCL 769.12.

[12] The trial court also erroneously sentenced defendant for a felonious assault conviction, which was subsequently removed from defendant's judgment of sentence.

[13] *Terrell*, unpub op at 1, 17.

manded for a determination of whether defendant's Iowa conviction constituted a felony in Michigan.[14] Finally, this Court concluded that the trial court failed to meet the articulation requirement for an upward sentence departure by failing to justify the particular sentence departure with objective and verifiable reasons.[15]

On April 11, 2014, the parties appeared for resentencing. The parties agreed to reduce the score for prior record variable (PRV) 2 (prior low severity felony convictions) from 30 to 20 points because the Iowa conviction was actually for a misdemeanor offense. The attorneys agreed to score PRV 5 (prior misdemeanor convictions) at two points, PRV 6 (relationship to criminal justice system) at 10 points, and PRV 7 (subsequent or concurrent felony convictions) at 20 points. However, defendant himself objected to the score for PRV 7, contending that it did not apply because he was subject to a mandatory consecutive sentence for his felony-firearm conviction. The trial court questioned the attorneys about defendant's position, but they agreed that defendant's convictions for other felonies still supported a 20-point score for PRV 7. Thus, defendant's total PRV score was 52 points, placing him in PRV Level E (50-74 points) on the applicable sentencing grid.[16]

With regard to scoring the offense variables (OVs), the parties agreed that OV 1 (aggravated use of a weapon) was appropriately scored at 25 points. The parties agreed to reduce the score for OV 2 (lethal potential of weapon possessed or used) from 15 to 5

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[14] *Id*. at 11-12.

[15] *Id*. at 13-17.

[16] MCL 777.65 (Class D sentencing grid). Assault with intent to do great bodily harm less than murder is a Class D offense.

points because the weapon was not fully automatic. The parties agreed that OV 3 (physical injury to victim) was appropriately scored at 100 points, that OV 4 (psychological injury to victim) was appropriately scored at 10 points, and that OV 9 (number of victims) was appropriately scored at 10 points. As for OV 12 (contemporaneous felonious criminal acts) and OV 13 (continuing pattern of criminal behavior), the parties agreed that while either offense variable could be scored at 25 points, both could not be scored. The parties also agreed that scoring either variable did not impact the outcome. The trial court scored OV 12 at zero points and OV 13 at 25 points. The parties agreed that OV 19 (threat to security of penal institution or court or interference with administration of justice or rendering of emergency services) was properly scored at 15 points. Thus, defendant received a total OV score of 190 points, placing him in OV Level VI (75+ points) on the applicable sentencing grid.[17] The defendant's habitual offender status was reduced to second-offense habitual offender because after remand, the prosecutor was precluded from adding other crimes to support the habitual offender enhancement. The prosecution could only correct errors, which included the Iowa misdemeanor conviction and the mistake of counting the same conviction twice. Therefore, defendant received a reduced guidelines range of 38 to 95 months for each of the assault with intent to do great bodily harm convictions, and lesser potential maximum sentences of 15 years for the assault convictions,[18] and 7½ years for the felon-in-possession conviction.[19]

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[17] *Id*.

[18] One-and-one-half times the maximum sentence for a first conviction. See MCL 750.84(1)(a); MCL 769.10(1)(a).

[19] One-and-one-half times the maximum sentence for a first conviction. See MCL 750.224f(5); MCL 769.10(1)(a).

The prosecutor argued that the trial court should reimpose the sentences it previously imposed, citing defendant's disregard for the law, his attitude toward law enforcement, and his inability to conform his conduct and be rehabilitated, as evidenced by his 19 major violations while in prison.[20] Defense counsel argued to the contrary, contending that the location of the shell casings and the lack of damage to the police cars indicated someone fleeing the scene, not a standoff with the police. Defense counsel further argued that defendant's several prior convictions were not assaultive or violent and noted that it was common for younger inmates to receive misconduct tickets. Defendant himself argued that his prison tickets were for minor things, not "monstrous stuff." Defendant also noted that he had obtained his GED while in prison and that he participated in prison programs, including a program dealing with substance abuse. Defendant denied ever shooting at the police and claimed that he was framed.

The trial court sentenced defendant to prison terms of 95 months to 15 years for each assault with intent to do great bodily harm less than murder conviction, 1 to 2 years for the resisting or obstructing conviction, 5 to 7½ years for the felon-in-possession conviction, and 2 years for the felony-firearm conviction.[21] As previously noted, the amended judgment of sentence indicates that the sentence for one of the assault convictions is

[20] Defendant received violations for incidents including an assault resulting in serious physical injury, and a charge of disobeying orders.

[21] The trial court also sentenced defendant to 4 to 6 years' imprisonment for a felonious assault conviction. The Michigan Department of Corrections notified the court that defendant's judgment of sentence appeared to contain an erroneous conviction for felonious assault. On April 24, 2014, the judgment of sentence was amended to remove the conviction and sentence for felonious assault.

consecutive to the sentence for the felony-firearm conviction, and that the felony-firearm conviction is concurrent with the remaining sentences. The trial court also ordered $408 in state costs, $130 for the crime victim's rights assessment, and $600 in court costs.

On June 27, 2014, defendant filed an amended motion for resentencing and for the correction of the presentence investigation report (PSIR). Defendant alleged that he was entitled to resentencing for the following reasons: (1) the OV 3, OV 4, and OV 9 scores were derived, at least in part, from facts not found by a jury beyond a reasonable doubt; (2) although current Michigan law did not support defendant's claim that the OVs should not be scored, the Michigan Supreme Court had recently granted leave in *People v Lockridge*[22] to address this issue; (3) at resentencing, the trial court had increased defendant's felon-in-possession sentence to 5 to 7½ years' imprisonment from 2 to 5 years' imprisonment without explanation, giving rise to a presumption of vindictiveness; (4) fees and costs had previously been waived because of defendant's indigent status, and under *People v Cunningham*,[23] it was error to include costs at defendant's resentencing; (5) if costs were deemed correctly imposed, they should be deferred until defendant was paroled; and (6) if the scoring errors were deemed waived, defendant was deprived of the effective assistance of counsel. Defendant also claimed that he was entitled to correction of his PSIR to remove any refer-

[22] *People v Lockridge*, 304 Mich App 278; 849 NW2d 388 (2014), lv granted 496 Mich 852 (2014).

[23] *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014), superseded by statute *People v Konopka (On Remand)*, 309 Mich App 345; 869 NW2d 651 (2015). Defendant previously filed a motion for resentencing on June 9, 2014. The amended motion for resentencing was filed to address the *Cunningham* decision, which was issued on June 18, 2014.

ences to a felonious assault conviction because he had not been convicted of that offense.

On July 11, 2014, the trial court heard oral arguments regarding the motion for resentencing. When defendant raised the issue of the OV scores, the trial court noted that defendant had preserved his *Lockridge* challenge by raising it in the motion, but concluded that it was premature to change the scoring in the absence of a decision from our Supreme Court. Defendant had amended the motion for resentencing because of the intervening *Cunningham* decision, and the trial court agreed to waive costs. The trial court also agreed to strike references to carjacking and felonious assault from the PSIR. Regarding the increased felon-in-possession sentence, 5 to 7½ years from 2 to 5 years, the trial court expressed surprise that defendant's sentence represented an increase from the original sentence, given that the 5-year minimum sentence was appropriate when considering the guidelines range for defendant's assault convictions. The prosecutor did not object to defendant being resentenced to 2 to 5 years' imprisonment for the felon-in-possession conviction, but in order to foreclose the possibility of an additional resentencing, the trial court surmised that a clerical error was responsible for the lower initial sentence reflected in the original judgment of sentence and denied defendant's motion to reinstate the lower sentence. On July 15, 2014, the trial court signed an order reflecting its rulings on defendant's motion for resentencing.

Defendant first argues that the trial court engaged in judicial fact-finding when scoring OVs 3, 4, and 9 of the sentencing guidelines, and that therefore, he is entitled to resentencing under *Alleyne v United States*.[24] We disagree that resentencing is necessarily required.

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[24] *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

As this Court recently explained in *People v Stokes*,[25] our Supreme Court, in *People v Lockridge*,[26] held that Michigan's sentencing scheme "violates the Sixth Amendment right to a jury trial because it requires 'judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the "mandatory minimum" sentence under *Alleyne*.' "[27] "[O]ur Supreme Court concluded that the appropriate remedy was to render Michigan's sentencing guidelines merely advisory."[28] Accordingly, our Supreme Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."[29] "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."[30] However, sentencing courts must "continue to consult the applicable guidelines range and take it into account when imposing a sentence."[31]

As explained in *Stokes*, the *Lockridge* Court described the procedure to be used when considering unpreserved *Alleyne*-based challenges, which are subject to plain-error review.[32] Regarding unpreserved *Alleyne* claims, our Supreme Court ruled that a defen-

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[25] *People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015).

[26] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

[27] *Stokes*, 312 Mich App at 193-194, quoting *Lockridge*, 498 Mich at 364.

[28] *Stokes*, 312 Mich App at 195, citing *Lockridge*, 498 Mich at 399.

[29] *Lockridge*, 498 Mich at 391.

[30] *Id*. at 392.

[31] *Id*.

[32] *Stokes*, 312 Mich App at 197.

dant suffers no prejudice in cases

> in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required."[33]

Our Supreme Court further held that

> all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry.[34]

Relying on *United States v Crosby*,[35] our Supreme Court held that

> in cases in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing.[36]

Our Supreme Court articulated the precise procedure to be followed, based on the procedure adopted in *Crosby*, which includes providing the defendant with an opportunity to inform the court that he or she will not seek resentencing.[37]

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[33] *Lockridge*, 498 Mich at 394-395.

[34] *Id*. at 395.

[35] *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

[36] *Lockridge*, 498 Mich at 397.

[37] *Stokes*, 312 Mich App at 198.

Unlike *Lockridge*, *Stokes* involved a preserved claim of error.[38] The Court in *Stokes* held that a preserved, nonstructural error is subject to the harmless beyond a reasonable doubt test.[39] Similarly, in the instant case, if we were to apply pre-*Lockridge* precedent, defendant's claim would be considered preserved because he raised the *Alleyne* issue in his motion for resentencing.[40] We find that nothing in *Lockridge* compels a different conclusion. Accordingly, we review defendant's claim for harmless error beyond a reasonable doubt.

Defendant conceded at his sentencing hearing that OVs 3, 4, and 9 were properly scored, and he does not dispute on appeal that the guidelines were properly scored under pre-*Lockridge* caselaw. Defendant now claims, however, that based on *Lockridge*, the scoring of these OVs was not supported by the jury's verdict. Defendant's OV score totaled 190 points, placing him in OV Level VI (75+ points) on the applicable sentencing grid.[41] Excluding the challenged OVs, defendant's total OV score would have been 70 points. Therefore, if any one of the challenged OVs was admitted by defendant or supported by the jury's verdict, then any judicial fact-finding regarding the other two OVs would not affect the range of defendant's minimum sentence.

Whether defendant admitted the facts necessary to support the scoring of OVs 3, 4, and 9[42] is of no

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[38] *Id*.

[39] *Id*. at 198.

[40] See *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004) ("[I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.").

[41] MCL 777.65.

[42] For the same reason that we concluded defendant did not waive the issue, we conclude that his agreement to the scoring was not an

consequence because the jury's verdict supported the scoring of OV 9.[43] Under OV 9, 10 points are assigned if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ."[44] MCL 777.39(2)(a) provides: "Count each person who was placed in danger of physical injury or loss of life or property as a victim." The jury found defendant guilty of assaulting three different officers. Therefore, scoring OV 9 for two to nine victims was supported by the jury's verdict. Defendant's argument that there was only one victim for each assault is unpersuasive. The jury clearly found that three officers were placed in danger when defendant opened fire.[45] Accordingly, with these 10 points, defendant's total OV score was 80 points, keeping him in OV Level VI (75+ points) on the applicable sentencing grid.[46] As a result, any judicial fact-finding regarding OVs 3 and 4 did not affect defendant's minimum sentence guidelines range.

In *Stokes*, this Court concluded that where judicially found facts increased the minimum sentence guidelines range, the proper remedy was to remand and follow the *Crosby* procedure to determine whether the error was harmless.[47] In this case, however, any judicial fact-finding did not increase the minimum sen-

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admission for *Lockridge* purposes. Rather, it could reasonably be interpreted as only an admission that the OVs were supported by a preponderance of the evidence.

[43] The prosecution conceded at oral argument that the facts necessary to score OVs 3 and 4 were not found by the jury.

[44] MCL 777.39(1)(c).

[45] See *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004) (concluding that 10 points were properly assessed under OV 9 when, although only one person was actually robbed, the person who was standing nearby and responded to the calls for help was also "placed in danger of injury or loss of life" during the armed robbery).

[46] MCL 777.65.

[47] *Stokes*, 312 Mich App at 198.

tence guidelines range because the jury verdict supported a score placing defendant at OV Level VI (75+ points). Nonetheless, we adopt the remedy crafted in *Stokes* as the appropriate remedy here, because regardless that judicial fact-finding did *not* increase defendant's minimum sentence guidelines range, the trial court's compulsory use of the guidelines was erroneous in light of *Lockridge*.[48] Here, the trial court was not obligated to sentence defendant within the minimum sentence guidelines range. Instead, the trial court was permitted to depart from the guidelines range without articulating a substantial and compelling reason, as long as the resulting sentence was itself reasonable.[49] Therefore, we conclude that a remand to engage in the *Crosby* procedure is necessary to determine whether the error resulting from the compulsory use of the guidelines was harmless.[50] As discussed in *Stokes*, our Supreme Court's agreement with the remand analysis in *Crosby* indicates that the *Crosby* procedure would apply to both preserved and unpreserved errors.[51] In addition, there is no logical reason why the *Crosby* procedure would apply to unpreserved errors, but not to preserved errors.[52] A defendant who preserves his or her claim of error should be entitled to

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[48] See *United States v Fagans*, 406 F3d 138, 140-141 (CA 2, 2005) (remanding for resentencing even though judicial fact-finding did not increase the sentence guidelines range, because the compulsory use of the federal sentencing guidelines was erroneous).

[49] *Lockridge*, 498 Mich at 391-392.

[50] See *Stokes*, 312 Mich App at 200. We decline the prosecution's invitation to review the sentencing hearing to determine whether there was any indication that the trial court felt constrained by the guidelines because, at the time of sentencing, the guidelines were mandatory.

[51] *Id*. See *Lockridge*, 498 Mich at 395-396, quoting *Crosby*, 397 F3d at 117-118.

[52] *Stokes*, 312 Mich App at 200.

at least as much constitutional protection as a defendant who does not preserve his or her claim.

Accordingly, we remand for the trial court to follow the *Crosby* procedure outlined in *Lockridge*. Defendant is entitled to avoid resentencing by promptly notifying the trial court of his intent to do so.[53] "If notification is not received in a timely manner," the trial court should continue with the *Crosby* procedure articulated in *Lockridge*.[54]

Defendant next seeks reinstatement of his original sentence of 2 to 5 years' imprisonment for felon in possession of a firearm, arguing that the increased sentence of 5 to 7½ years that was imposed on remand is impermissibly vindictive. Defendant does not challenge the propriety of this sentence on any ground except vindictiveness. A presumption of vindictiveness arises when a defendant is resentenced by the same judge and the second sentence is longer than the first.[55] If the trial court states the reasons for the increase at the resentencing, the presumption may be overcome.[56]

The record does not support defendant's argument that the increased sentence was motivated by vindictiveness. Contrary to what defendant asserts, the trial court explained its reasons for imposing the higher sentence by expressing surprise that it had imposed a lesser sentence originally, explaining that it considered the five-year minimum sentence in relation to the guidelines range for defendant's assault conviction, and determining that a five-year minimum sentence was appropriate in consideration of that range. Because defendant does not dispute that computation,

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[53] *Lockridge*, 498 Mich at 398.

[54] *Id*. See also *Stokes*, 312 Mich App at 203.

[55] *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

[56] *Id*.

because the trial court's reasons for imposing the enhanced sentence at resentencing establish that the sentence was not motivated by vindictiveness, and because defendant does not otherwise challenge the propriety of the enhanced sentence in light of his habitual offender status, defendant has failed to demonstrate that resentencing is required on this ground.

Defendant also challenges the trial court's assessment of fees and costs, as reflected in the amended judgment of sentence dated April 24, 2014. At defendant's original sentencing, the trial court agreed to waive all fees and costs in light of defendant's indigent status. However, the amended judgment of sentence issued on remand contained assessments of fees and costs. Defendant filed a motion to correct the amended judgment of sentence, and the trial court issued an order dated July 15, 2014, in which it agreed to waive all fees and costs in accordance with its decision at the original sentencing. However, there is no indication that a corrected judgment of sentence was issued. Accordingly, we remand for the ministerial task of correcting the judgment of sentence to reflect the waiver of fees and costs.

Lastly, in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he is entitled to resentencing because the trial court erred by scoring 20 points for prior record variable (PRV) 7. There is no merit to this issue. MCL 777.57(1)(a) directs a score of 20 points for PRV 7 if a defendant has two or more subsequent or concurrent felony convictions, but MCL 777.57(2)(b) and (c) preclude the court from scoring "a felony-firearm conviction," or "a concurrent felony conviction if a mandatory consecutive sentence or a consecutive sentence imposed under section 7401(3) of the

public health code, 1978 PA 368, MCL 333.7401, will result from that conviction." Defendant argues that because he had a concurrent felony-firearm conviction, the trial court was not permitted to score PRV 7. We disagree.

Defendant's argument is directed at the interpretation of the legislative sentencing guidelines, which presents a legal question that we review de novo.[57] The instructions for PRV 7 only precluded the trial court from relying on the felony-firearm conviction for purposes of scoring PRV 7. The instructions did not preclude the court from relying on defendant's remaining felony convictions. In addition to his felony-firearm conviction, defendant stood convicted of three counts of assault with intent to do great bodily harm less than murder, resisting or obstructing a police officer, and felon in possession of a firearm, all of which are felonies and none of which resulted in a consecutive sentence.[58] Thus, defendant had at least two concurrent felony convictions that could be considered for purposes of PRV 7. Therefore, the trial court properly assigned 20 points to PRV 7.[59]

Remanded for proceedings consistent with this opinion and for ministerial correction of the judgment of

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[57] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[58] We note that the amended judgment of sentence appears to incorrectly indicate that the sentence for one of the assault convictions is consecutive to the sentence for the felony-firearm conviction, which is itself concurrent with the other sentences. Generally, a sentence for a felony-firearm conviction is to be consecutive with and precede the sentence for the felony conviction. MCL 750.227b(3). Defendant may raise this issue on remand.

[59] Having found no error in scoring PRV 7, we similarly reject defendant's suggestion that counsel was ineffective. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

sentence to reflect the waiver of fees and costs in accordance with the trial court's July 15, 2014 order.[60] We do not retain jurisdiction.

TALBOT, P.J., and FORT HOOD, J., concurred with WILDER, J.

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[60] Defendant also asserts that this case should be reassigned to a different judge for resentencing based on the trial court's decision to increase defendant's sentence for the felon-in-possession conviction and the trial court's scoring of PRV 7. Having concluded that these do not constitute grounds for resentencing, we reject this argument. Further, given that we are remanding for the trial court to follow the *Crosby* procedure articulated in *Lockridge*, it is appropriate for the same judge to determine whether he would have imposed a materially different sentence but for the constitutional error.

PEOPLE v BERGMAN

Docket No. 320975. Submitted September 1, 2015, at Detroit. Decided September 29, 2015, at 9:10 a.m. Leave to appeal denied 499 Mich 916.

Lisa Lynne Bergman was convicted by a jury in the St. Clair Circuit Court of two counts each of second-degree murder, MCL 750.317; operating a vehicle under the influence of intoxicating liquor or a controlled substance (OUIL) causing death, MCL 257.625(4); and operating a vehicle with a suspended license causing death, MCL 257.904(4), after the truck she was driving crossed the centerline and collided with another truck, killing its driver (Russell Ward), and his passenger. Although defendant's blood alcohol concentration was below the legal limit, she tested positive for therapeutic amounts of various prescription drugs or their metabolites. The court, Michael L. West, J., sentenced defendant as a second-offense habitual offender to concurrent prison terms of 25 to 50 years each for the second-degree murder convictions and 5 to 22½ years for each conviction of OUIL and driving with a suspended license. Defendant appealed as of right.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by excluding evidence of intoxicants and controlled substances in Ward's bloodstream. The evidence established that defendant's vehicle crossed the centerline and struck Ward's truck head-on. There was no evidence that Ward was not properly driving within his marked lane or that his vehicle would not have safely passed defendant had defendant not crossed the centerline in front of Ward. Because there was no evidence that Ward did anything to contribute to the accident, the challenged evidence was not probative of an intervening or superseding cause that could have broken the causal link between defendant's conduct and the victims' deaths. An accident victim's inability to protect himself and others from the consequences of another person's unexpected introduction of a serious hazard does not constitute an intervening cause severing the causal chain between a defendant and the victim. Ward's intoxication was also not relevant to defendant's argument that she did not have the requisite level of intent to support her conviction of second-degree murder. The offense of

second-degree murder is committed when a defendant has knowledge of her own propensity to create a notably severe hazard when driving while intoxicated, and the victim's state of intoxication is irrelevant to the defendant's knowledge of her own susceptibility to hazardous driving.

2. The trial court did not violate defendant's right to due process of law by denying her motion for the appointment of a toxicology expert at public expense because she did not demonstrate a nexus between the need for an expert and the facts of her case. Defendant did not explain why she could not safely proceed to trial without her own expert, establish why the objective results of blood analysis might be unreliable, make an offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving, or establish that expert testimony would have been likely to benefit her case. Accordingly, the trial court did not abuse its discretion by denying defendant's motion.

3. There was no error to review with regard to the denial of defendant's motion to appoint an investigator because defendant withdrew the motion before it was decided, thereby waiving the issue.

4. Defendant's convictions for multiple counts of second-degree murder, OUIL causing death, and driving with a suspended license causing death did not violate her constitutional protections against double jeopardy. The statutes governing second-degree murder and driving with a suspended license causing death enforce distinct societal norms, and their respective elements of malice and lack of a valid operator's license are distinctive to each. Similarly, the OUIL and suspended-license statutes enforce distinct societal norms, and their respective elements of intoxication while driving and lack of a valid operator's license are distinctive to each.

5. The trial court did not abuse its discretion by admitting evidence of defendant's other acts of driving unsafely under MRE 404(b)(1). Evidence of incidents in which defendant was passed out in her vehicle or was involved in an accident while impaired or while under the influence of or possessing prescription pills was properly admitted to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances. Because the prior incidents were minor in comparison to the charged offenses involving a head-on

collision that caused the deaths of two individuals, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. The fact that defendant offered to stipulate that her license had been suspended did not render the other-acts evidence inadmissible because the evidence was relevant to prove the element of malice.

6. Defendant was not entitled to resentencing under *People v Lockridge*, 498 Mich 358 (2015), because facts found by the jury were sufficient to assess the minimum number of offense variable (OV) points necessary for defendant's score to fall in the cell of the sentencing grid under which she was sentenced. The trial court assessed 50 points for OV 3, which is appropriate when a victim was killed, the death resulted from the commission of a crime and the offense involved the operation of a vehicle, and the offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance. Each of these facts was necessarily found by the jury beyond a reasonable doubt because the jury found defendant guilty of second-degree murder, which requires the death of a victim, and the jury also found defendant guilty of OUIL causing death, which required the jury to find that defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof. The trial court also assessed 100 points for OV 9, which is appropriate when multiple deaths occurred. The jury found defendant guilty of two counts each of second-degree murder. Because more than 100 OV points could be sustained on the basis of facts found by the jury beyond a reasonable doubt, defendant could not establish prejudice from any error was therefore not entitled to resentencing or other relief.

Affirmed.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — SECOND-DEGREE MURDER — DRIVING WITH SUSPENDED LICENSE CAUSING DEATH.

A person may be convicted of second-degree murder and driving with a suspended license causing death without violating the constitutional protections against double jeopardy; the statutes governing these crimes enforce distinct societal norms, and their respective elements of malice and lack of a valid operator's license are distinctive to each (US Const, Am V; Const 1963, art 1, § 15; MCL 750.317; MCL 257.904(4)).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — OPERATING A VEHICLE UNDER THE INFLUENCE OF LIQUOR CAUSING DEATH — DRIVING WITH SUSPENDED LICENSE CAUSING DEATH.

A person may be convicted of second-degree murder and operating a vehicle under the influence of liquor causing death without violating the constitutional protections against double jeopardy; the statutes governing these crimes enforce distinct societal norms, and their respective elements of intoxication while driving and lack of a valid operator's license are distinctive to each (US Const, Am V; Const 1963, art 1, § 15; MCL 257.625(4); MCL 257.904(4)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

Stuart G. Friedman for defendant.

Before: TALBOT, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. A jury convicted Lisa Lynne Bergman of two counts each of second-degree murder, MCL 750.317; operating a vehicle under the influence of intoxicating liquor or a controlled substance (OUIL) causing death, MCL 257.625(4); and operating a vehicle with a suspended license causing death, MCL 257.904(4). The trial court sentenced defendant, as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 25 to 50 years each for the second-degree murder convictions, and 5 to 22½ years for each conviction of OUIL and driving with a suspended license. Defendant appeals as of right. We affirm.

I

Defendant's convictions arise from a two-vehicle collision in Kimball Township in St. Clair County

shortly before 2:00 a.m. on July 20, 2013. A witness to the scene of the accident testified that there was heavy rain and fog. Defendant was driving a Ford F-350 pickup truck in the eastbound lane of Lapeer Road when she crossed the centerline, veered into the westbound lane, and collided head-on with a GMC Sonoma S-10 pickup truck. Lieutenant Terpenning,[1] an expert in accident reconstruction, testified that there was "no question" in his mind that defendant's vehicle crossed the centerline into oncoming traffic. He did not observe anything to indicate that the S-10 pickup truck did anything improper or did "anything other than driv[e] down its intended lane of travel." The driver of the GMC truck, Russell Ward, and his passenger, Koby Raymo, both died from blunt traumatic injuries.

Defendant's blood alcohol concentration (BAC) was below the legal limit,[2] but she also tested positive for carisoprodol (trade name Soma, which is a muscle relaxant and not an opiate), meprobamate (the active metabolite of carisoprodol), oxycodone, and amphetamine. Although the levels of these drugs in her system were within the therapeutic range,[3] Dr. Michele Glinn, an expert in forensic toxicology and the effect of drugs and alcohol on the human body, testified that the drugs, other than amphetamine, were central nervous system depressants and combining them could mag-

[1] Lieutenant Terpenning's first name does not appear in the record.

[2] Defendant's BAC measured from blood samples taken at the hospital after the accident was 52 milligrams per deciliter (0.052 grams per 100 milliliters). There was testimony that this would be equivalent to a ".04 whole blood result[]." The sample measured by the State Police revealed a BAC of 0.01 grams per 100 milliliters.

[3] According to expert testimony, defendant's carisoprodol level was within the therapeutic range and her meprobamate level was possibly within the therapeutic range, although the expert could not say for certain.

nify the effects and keep the drugs in the system longer. Glinn testified that, in particular, alcohol and Soma are a "bad combination." In Glinn's opinion, the drugs in defendant's system affected her ability to operate a motor vehicle.

At trial, over defendant's objection, the prosecution presented evidence of seven prior incidents in which defendant drove erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription substances, such as carisoprodol or Soma, or was in possession of pills, such as Vicodin or Soma.[4] This evidence was offered for its relevance to the malice element of second-degree murder because it was probative of defendant's knowledge of how her substance abuse impaired her driving. Glinn opined that the current accident was the only incident in which defendant used alcohol in combination with other drugs.

Before trial, the prosecutor filed notice of its intent to introduce evidence of defendant's prior acts under MRE 404(b). The prosecutor asserted that defendant's prior conduct showed that she knew that consuming drugs and alcohol impaired her ability to safely operate a vehicle, and the evidence was relevant to prove the necessary element of malice for second-degree murder. Defendant moved to exclude evidence of her prior acts and to strike the prosecutor's filing of notice. She argued that the police reports filed with the prosecutor's notice of intent were inadmissible hearsay, and she contended that the filing of these reports would give the media access to unproven charges and deprive her of a fair trial. Defendant further argued that the prior incidents were not admissible under MRE 404(b)

[4] This other-acts evidence is discussed more fully in Part VI of this opinion.

because the court rule was intended to apply only to preplanned criminal activity, not to unintentional conduct. Lastly, defendant argued that if the prior incidents were admitted, she would lose her right to have her guilt or innocence determined on the facts of the case. She asserted that a limiting instruction would not be sufficient to prevent any prejudice.

The prosecutor argued that in all of the prior incidents, defendant had carisoprodol, or Soma, and its metabolite, meprobamate, in her system.[5] In a majority of the cases, defendant had hydrocodone (Vicodin) in her system. The instant case involved the opiate oxycodone (Oxycontin). In all but one prior incident, defendant was in possession of various pills, including Soma and Vicodin. The prosecutor argued that these incidents established a pattern of behavior in which defendant ingested controlled substances and drove her vehicle, despite knowing the risk of doing so. The prosecutor also argued that defendant's persistence in this pattern clearly demonstrated a lack of mistake or accident, and showed that she knowingly engaged in behavior that created a high risk of death or serious harm to others. As such, the prosecutor contended, the evidence was relevant to prove the requisite degree of malice for second-degree murder.

At the hearing on this motion, defendant argued that the "gratuitously filed" police reports filed in this matter should be struck. Defendant argued that if the prosecutor was permitted to introduce evidence of the other cases, "we will be fighting . . . perhaps up to five simultaneous cases all at the same time in the Circuit

[5] Contrary to the prosecutor's argument below, the evidence at trial did not establish that defendant was under the influence of Soma during the January 1, 2008 incident, although she was in possession of Soma pills.

Court," which would result in a "prejudicial effect . . . beyond any possible curative jury instruction[.]" Defendant argued that knowledge, accident, and absence of mistake were irrelevant when there was no allegation that defendant committed an intentional act. The trial court denied the defendant's motion, concluding that knowledge and absence of mistake were at issue and the prosecutor had a legitimate purpose in admitting the evidence "to show that this particular Defendant had knowledge of how these particular drugs affect her and how it affects her ability to drive . . . ." The trial court agreed to give a cautionary instruction if requested.

Defendant also moved for appointment of an expert witness at public expense. She argued that the accuracy and interpretation of the State Police laboratory tests were critical issues in the case, and claimed that she would be deprived of a "meaningful defense" unless an independent expert determined the accuracy and relevance of the "purported findings" in the laboratory reports. The cost of an independent examination of each test result was $1,500. A retest of what defendant referred to as "Sample B" was $760. Defendant argued that, at a minimum, she required an expert evaluation of her blood test results on the night of the fatal collision and the Sample B blood draw. She asserted that she was indigent and unable to pay these costs.

The prosecutor argued in response that the prosecutor's endorsement of an expert witness does not automatically entitle an indigent defendant to a court-appointed expert. Defendant also failed to allege any irregularity or deficiency with respect to the State Police Crime Lab's methods or protocols that would establish a genuine need for a defense expert.

At the hearing on this motion, defense counsel stated that he needed an expert to advise him on reviewing the toxicology reports and the "B sample." He explained that two samples are taken: the A sample, which is analyzed by the forensic lab, and the B sample, which is reserved for later testing. He asserted that the prosecutor could not reasonably argue that toxicology reports were relevant to the prosecution's case, but not relevant to the defense. The prosecutor responded that defendant's motion did not include arguments about relevance and interpretation of lab results. Rather, defendant's motion was based on reviewing methods and protocols to ensure that the State Police Crime Lab used proper methods, and a defendant is not entitled to an expert merely because the prosecutor relies on an expert, but instead must establish a "sufficient nexus" between appointment of an expert and a potential flaw in the prosecution's expert evidence. Defense counsel replied that he could not determine whether protocols were followed. The trial court stated that the prosecutor was making every effort to provide the "instrumental data" to the defense for review and analysis. The trial court agreed with the prosecutor that defendant had not established a sufficient nexus justifying further testing or duplicate testing to see if the same result would be obtained. The court indicated that it was unwilling to appoint at public expense an expert to duplicate the prosecution's forensic testing, but it did not rule out the appointment of a consultant-type expert to assist in reviewing the existing data and materials from the prosecution.

Also before trial, defendant moved for appointment of an investigator "to interview witnesses who were in a position to observe the defendant prior to and immediately following the collision." Defendant needed the investigator because defense counsel's attempts to per-

form an investigation had not yet yielded results. Defendant subsequently withdrew this motion after the trial court granted an adjournment of trial to allow defense counsel more time for preparation.

In another pretrial motion, the prosecutor sought to exclude evidence of the deceased victims' toxicology reports. The prosecutor noted that Ward's toxicology report indicated that he had a BAC of 0.054 grams per 100 milliliters, and 6.2 nanograms per milliliter of delta-9 tetrahydrocannabinol (THC) and 17 nanograms per milliliter of delta-9 carboxy THC in his bloodstream. His passenger, Koby Raymo, had a BAC of 0.110 grams per 100 milliliters, and also 7.5 nanograms per milliliter of delta-9 THC and 10 nanograms per milliliter of delta-9 carboxy THC in his bloodstream. The prosecutor argued that this evidence should be excluded because it was not relevant and it was unduly prejudicial. Raymo's toxicology results were irrelevant because he was a passenger and could not have contributed to the accident. Ward's toxicology results were irrelevant because the evidence clearly established that defendant crossed the centerline and struck Ward's vehicle head-on, with no negligence by Ward. Finally, the prosecutor argued that any probative value of the evidence was outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues.

Defendant argued in response that Ward's toxicity levels were relevant to the issues of fault and causation. At the hearing on the motion, defense counsel argued that the other driver had "therapeutic levels" of the opiate pain reliever Tramadol and benzodiazepine. The trial court excluded the evidence on the basis that there was no legitimate question of fact regarding the proximate cause of the accident. At trial, defense counsel conducted voir dire examination of Dr. Mary

Pietrangelo, the deputy medical examiner who performed autopsies on Ward and Raymo, in order to create a record of excluded testimony. Pietrangelo testified that Ward's ethanol level was below the legal limit, his level of Tramadol (a pain medication) was within a therapeutic dosage, and he had been exposed to marijuana or a similar substance, but she could not determine the level of exposure. Pietrangelo ruled out those substances as contributing factors to his manner of death. Defense counsel then renewed his motion to admit Ward's toxicology results. He argued that they were relevant to show that Ward was unable to remain alert and react to sudden emergencies. The trial court stated that if Ward's conduct was a factor in the proximate cause of his death, "that does not necessarily negate or nullify the conduct of Ms. Bergman if the facts support what it is that she's being accused of." The trial court concluded that in order for such evidence to be potentially admissible, there would have to be something "fairly substantial in terms of the detail of this accident that would suggest that Mr. Ward was somehow a cause of the accident." While the trial court did not rule out admitting the evidence of Ward's toxicology after development of the testimony, it was never admitted.

After the prosecution rested its case, defendant moved for a directed verdict regarding the two second-degree-murder charges. The trial court denied the motion.

The jury found defendant guilty of both counts of second-degree murder, both counts of OUIL causing death, and both counts of driving with a suspended license causing death. At sentencing, defendant objected to the scoring of 50 points for offense variable (OV) 3, but the trial court found that 50 points were

properly assessed. Defendant also objected to the scoring of OV 9, but the trial court found that 100 points were properly assessed. Defendant objected to the scoring of 25 points for OV 6, but the trial court found that the assignment of 25 points was proper. Next, defendant objected to the scoring of 25 points for OV 13, and the trial court agreed that it should be scored at zero points. Defendant argued that OV 17 should be scored at zero points and the prosecution agreed. According to the sentencing information report, OV 5 was scored at 15 points, and OV 18 was scored at five points. Defendant's total OV score was 195 points, and her prior record variable (PRV) score was 37 points, placing her in OV level III (100+ points) and PRV level D (25-49 points) of the applicable sentencing grid, MCL 777.61. The trial court concluded from these scores that defendant's sentencing guidelines range was 270 to 562 months or life, as enhanced for a second-offense habitual offender, and sentenced defendant to concurrent prison terms of 25 to 50 years each for the second-degree murder convictions, and 5 to 22½ years for each conviction of OUIL causing death and driving with suspended license causing death.

II

Defendant first contends that the trial court erred by excluding evidence of intoxicants and controlled substances in the bloodstream of Ward, the driver of the other vehicle, on the basis that the evidence was relevant to establishing that Ward may have been negligent and that defendant's own conduct did not rise to the level of depraved indifference for human life. We disagree.

We review preserved claims of evidentiary error for an abuse of discretion. *People v Unger*, 278 Mich App

210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217.

"Generally, all relevant evidence is admissible at trial," and "[e]vidence which is not relevant is not admissible." *People v Powell*, 303 Mich App 271, 277; 842 NW2d 538 (2013) (quotation marks and citations omitted); see also MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *People v McLaughlin*, 258 Mich App 635, 665; 672 NW2d 860 (2003). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011) (quotation marks and citation omitted). Evidence is probative if it "tends to make the existence of any fact that is of consequence of the determination of the action more probable or less probable than it would be without the evidence[.]" *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.) (quotation marks and citation omitted).

In *Feezel*, the defendant struck and killed a pedestrian with his car. In dark and heavily rainy conditions, the victim was walking in the middle of an unlit, five-lane road, with his back to oncoming traffic. The victim was "extremely intoxicated" at the time of the accident with a blood alcohol content of 0.268 grams per 100 milliliters of blood, or higher. The defendant's blood alcohol content was 0.091 to 0.115 grams per 100 milliliters, and marijuana was detected in his blood. *Feezel*, 486 Mich at 188-189 (opinion by CAVANAGH, J.).

The defendant was charged with failing to stop at the scene of an accident that resulted in death, MCL 257.617(3); operating while intoxicated, second offense, MCL 257.625(1); and operating a motor vehicle with the presence of a controlled substance in his body, causing death, MCL 257.625(4) and (8). *Id*. at 187-188. The defendant argued on appeal that the trial court abused its discretion by granting the prosecutor's motion in limine to preclude evidence related to the victim's intoxication. *Id*. at 189, 191. Our Supreme Court concluded that the evidence was relevant to the issue of causation. *Id*. at 191. The Court reviewed the concept of proximate cause, observing:

> Proximate causation "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." If the finder of fact determines that an intervening cause supersedes a defendant's conduct "such that the causal link between the defendant's conduct and the victim's injury was broken," proximate cause is lacking and criminal liability cannot be imposed. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation. In contrast, "gross negligence" or "intentional misconduct" on the part of a victim is considered sufficient to "break the causal chain between the defendant and the victim" because it is not reasonably foreseeable. Gross negligence, however, is more than an enhanced version of ordinary negligence. "It means wantonness and disregard of the consequences which may ensue . . . ." "Wantonness" is defined as "[c]onduct indicating that the actor is aware of the risks but indifferent to the results" and usually "suggests a greater degree of culpability than recklessness . . . ." Therefore, while a victim's negligence is not a defense, it is an important factor to be considered by the

> trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt. [*Id*. at 195-196 (citations omitted).]

The Court concluded that, because the prosecution was required to prove the element of causation beyond a reasonable doubt, evidence of the victim's BAC was material. *Feezel*, 486 Mich at 198 (opinion by CAVANAGH, J.). The Court held that the evidence was "highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him." *Id*. at 199. The Court acknowledged that "being intoxicated, by itself, is not conduct amounting to gross negligence." *Id*. However, examining the specific circumstances of that case, the Court determined that "the proffered superseding cause was the victim's presence in the middle of the road with his back to traffic at night during a rain storm with a sidewalk nearby." *Id*. Accordingly, "the proofs were sufficient to create a jury-submissible question about whether the victim was grossly negligent, and the victim's high level of intoxication would have aided the jury in determining whether the victim acted with 'wantonness and a disregard of the consequences which may ensue . . . .' " *Id*. (citation omitted). The Court also importantly noted:

> Depending on the facts of a particular case, there may be instances in which a victim's intoxication is not sufficiently probative, such as when the proofs are insufficient to create a question of fact for the jury about whether the victim was conducting himself or herself in a grossly negligent manner. [*Id*. at 198-199.]

Applying *Feezel* to the instant case, we conclude that the excluded evidence is not probative of an interven-

ing or superseding cause that could break the causal link between defendant's conduct and the victims' deaths. Unlike the pedestrian in *Feezel*, who unnecessarily placed himself in the path of oncoming traffic in conditions of poor visibility, there was no evidence that the victims in this case had placed themselves in a hazardous situation at the time of the collision. The evidence established that defendant's vehicle crossed the centerline and struck the GMC truck head-on. There was no evidence that Ward was not properly driving within his marked lane, or that Ward's vehicle would not have safely passed defendant if defendant had not crossed the centerline in front of Ward, presenting a serious and unexpected hazard. Thus, there was no evidence that Ward did anything that contributed to the accident in a way that would establish that he was negligent or grossly negligent and by his conduct was an intervening cause of the accident. Although defendant speculates that Ward's consumption of controlled substances impaired his ability to react and avoid the accident, a driver's failure to avoid a vehicle that suddenly crosses the median directly in the path of oncoming traffic does not constitute gross negligence breaking the causal link. An accident victim's inability to protect himself and others from the consequences of another person's unexpected introduction of a serious hazard does not constitute an intervening cause severing the causal chain between the defendant and the victim.

Defendant also argues that Ward's intoxication was relevant to her defense of the second-degree murder charge because it would have shown that she did not have the requisite level of intent. "[T]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *Powell*, 303 Mich App at 277 (citation

and quotation marks omitted). The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citation omitted). In *Werner*, this Court addressed circumstances in which intoxicated driving resulting in a fatality rises to the level of second-degree murder:

> We also recognize that *Goecke* held that not every intoxicated driving case resulting in a fatality constitutes second-degree murder. However, the evidence in this case disclosed "a level of misconduct that goes beyond that of drunk driving." This is not a case where a defendant merely undertook the risk of driving after drinking. Defendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunken driving episode

> could cause him to make another major mistake, one that would have tragic consequences. [*Werner*, 254 Mich App at 533 (citations omitted).]

Thus, the offense of second-degree murder is committed when the defendant has knowledge of *her* own propensity to create a notably severe hazard when driving while intoxicated, and the victim's state of intoxication is irrelevant to the defendant's knowledge of her own susceptibility to hazardous driving. We find no basis to depart from the intervening-cause analysis articulated in *Feezel* in a case such as this, a prosecution for second-degree murder, when the evidence does not support the theory that the victim broke the chain of causation stemming from the defendant's conduct. Accordingly, we conclude that the trial court did not abuse its discretion in excluding as irrelevant the evidence of Ward's alcohol and substance exposure.

III

Defendant next argues that she was denied due process of law and is entitled to a new trial because the trial court erroneously denied her motion for appointment of a toxicology expert at public expense. We disagree.

We review the trial court's decision whether to appoint an expert for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

> MCL 775.15 authorizes payment for an expert witness, provided that an indigent defendant is able to show "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . ." If the defendant makes this showing, the judge, "in his discretion," may grant funds

> for the retention of an expert witness. A trial court is not compelled to provide funds for the appointment of an expert on demand.
>
> To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. [*People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006) (citations omitted).]

Defendant relies on *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985) (quotation marks and citation omitted), in which the United States Supreme Court held that "[m]eaningful access to justice" and fundamental fairness require that indigent defendants be afforded, at state expense, the "basic tools of an adequate defense or appeal[.]" This Court recognized *Ake* in *People v Leonard*, 224 Mich App 569, 580-581; 569 NW2d 663 (1997), and still concluded that "a defendant must show a nexus between the facts of the case and the need for an expert." *Id*. at 582.

We conclude that *Ake* does not require appointment of a defense expert without a demonstration of a nexus between the need for an expert and the facts of the case. Here, defendant failed to establish the requisite nexus. She asserted that toxicology evidence was a critical part of the prosecution's case, but she did not explain why she could not safely proceed to trial without her own expert. See MCL 775.15. She did not establish why the objective results of blood analysis might be unreliable. She made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications

and their contribution to impaired driving. Defendant failed to establish that expert testimony would likely benefit her case. A mere possibility that the expert would have assisted the defendant's case is not sufficient. *Carnicom*, 272 Mich App at 617. Accordingly, the trial court did not abuse its discretion by denying defendant's motion.

IV

Defendant also argues that the trial court erred by denying her motion for appointment of an investigator. Although defendant moved for the appointment of a defense investigator, defendant withdrew the motion before it was decided. By voluntarily withdrawing her motion, defendant waived her right to a defense investigator. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment or abandonment of a known right). A waiver extinguishes any error, leaving no error to review. *Id*.

V

Defendant next argues that her convictions for multiple counts of second-degree murder, OUIL causing death, and driving with a suspended license causing death in connection with the death of each victim violated her double jeopardy protections under the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

Because defendant did not raise this double jeopardy issue in the trial court, review is limited to plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). "The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for

both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). "A dual prosecution and conviction of a higher offense and a lesser cognate offense are permissible where the Legislature intended to impose cumulative punishment for similar crimes, even if both charges are based on the same conduct." *Werner*, 254 Mich App at 535. In *Werner*, this Court squarely held that dual convictions for OUIL causing death and second-degree murder do not violate the double jeopardy clauses, explaining:

> In *People v Kulpinski*, 243 Mich App 8, 620 NW2d 537 (2000), this Court found no double jeopardy implications where a defendant was convicted of both OUIL causing death and involuntary manslaughter, MCL 750.321. Because the Legislature intended for the two statutes to enforce distinct societal norms, and because each statute contained an element not found in the other, the Court concluded that multiple punishments were permissible. *Id*. at 18-24; see also *People v Price*, 214 Mich App 538; 543 NW2d 49 (1995). This reasoning applies with equal force to dual convictions of second-degree murder and OUIL causing death. If the Legislature intended for the OUIL causing death statute to enforce societal norms that are distinct from the societal norms enforced by the involuntary manslaughter statute (grossly negligent conduct), it clearly also intended the OUIL statute to enforce societal norms other than those enforced by the second-degree murder statute (proscribing wanton conduct likely to cause death or great bodily harm). *Id*. at 543-544; *Kulpinski*, [243 Mich App] at 22-23. Moreover, the OUIL causing death statute and second-degree murder statute each contain an element not found in the other. The OUIL causing death statute includes the element of operating a motor vehicle with a specified blood alcohol level, but not the element of malice; the converse is true of the second-degree murder statute. *Price*, [214 Mich App] at 545-546; *Kulpinski*, [243 Mich App] at 23-24. Accordingly, defendant's convictions of both

> second-degree murder and OUIL causing death do not violate the Double Jeopardy Clauses. [*Werner*, 254 Mich App at 535-536.]

Although the *Werner* Court did not address double jeopardy concerns with respect to convictions of second-degree murder and driving with a suspended license causing death, or convictions of OUIL causing death and driving with a suspended license causing death, the analysis in *Werner* applies with equal force to these combinations of convictions. The statutes governing second-degree murder and driving with a suspended license causing death enforce distinct societal norms, and their respective elements of malice and lack of a valid operator's license are distinctive to each. See *Smith*, 478 Mich at 70; MCL 257.904(4). Similarly, the OUIL and suspended-license statutes enforce distinct societal norms, and their respective elements of intoxication while driving and lack of a valid operator's license are distinctive to each. See MCL 257.625(4); MCL 257.904(4).[6] Accordingly, defendant's multiple convictions do not violate the double jeopardy clauses.

VI

Defendant next argues that the trial court erred by admitting evidence of her prior acts under MRE 404(b)(1). We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, but permits such evidence for other purposes, "such as proof of motive, opportunity,

[6] Defendant concedes that this Court is bound by *Werner*.

intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." Evidence of other crimes or bad acts is admissible when it is offered for a proper purpose, MRE 404(b)(1); it is relevant under MRE 402; and its probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In *Werner*, 254 Mich App at 533-534, this Court held that evidence that the defendant had previously experienced an alcohol-induced blackout while driving, during which he "crash[ed] on boulders in front of a house, without any knowledge of where he was or what he was doing," was admissible under MRE 404(b)(1) in a case in which the defendant was charged with second-degree murder; OUIL causing death, OUIL causing serious impairment of a body function; MCL 257.625(5); and driving with a suspended license, second offense, MCL 257.904(1). This Court held that the evidence was properly admitted to show knowledge and absence of mistake, and was probative of the malice element for second-degree murder because it showed "that defendant knew that heavy drinking could lead to a blackout, and that a blackout could lead to defendant's driving without any understanding of what he was doing." *Id*. at 539-540. The evidence also was relevant because the defendant's previous blackout while driving "made it more probable than not that he was aware this could happen to him." *Id*. at 540. This Court further concluded that the probative value of the evidence outweighed any prejudicial effect because the prior incident involving a one-vehicle accident with no injuries to anyone was a minor incident in comparison to the charged offense, in which the defendant drove the wrong way on a freeway and caused the

death of a young woman and seriously injured a young man. In addition, the trial court gave an appropriate cautionary instruction. *Id*.

We conclude that *Werner* is directly on point. The prior acts evidence here involved incidents in which defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence of prescription substances, or was in possession of pills, such as Vicodin and Soma. This evidence was properly admitted to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances. And, because the prior incidents were minor in comparison to the charged offenses involving a head-on collision that caused the deaths of two individuals, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Lastly, the trial court gave an appropriate cautionary instruction to reduce any potential for prejudice.

We reject defendant's assertion that, under *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), there was no need to introduce the prior acts evidence because she could have stipulated that her license was suspended. In *Old Chief*, the United States Supreme Court held that the trial court abused its discretion in rejecting the defendant's offer to stipulate that he had a prior felony conviction, a necessary element of the charged offense of felon in possession of a firearm. *Id*. at 174. The Court observed that "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant" and that the defendant's admission of a

prior conviction was not only sufficient to prove that element of the charged offense, but also was "seemingly conclusive evidence of the element." *Id*. at 185-186. The Court acknowledged that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense," but reasoned that the "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has . . . virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Id*. at 189-190.

In *People v Crawford*, 458 Mich 376, 378; 582 NW2d 785 (1998), our Supreme Court considered the admission of the defendant's prior conviction of possession with intent to deliver cocaine in his jury trial for possession with intent to deliver cocaine. Citing *Old Chief*, the Court concluded that the defendant's intent was in issue "[b]ecause the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements . . . ." *Crawford*, 458 Mich at 389. In *People v McGhee*, 268 Mich App 600, 610 n 3; 709 NW2d 595 (2005), this Court, citing *Crawford*, rejected the defendant's argument that the prosecutor should not be permitted to introduce prior acts evidence to prove that the defendant acted with the requisite intent to distribute drugs.

Here, defendant's offer to stipulate that she had a suspended license, while being conclusive of a necessary element for that offense, would not have been conclusive of or a sufficient substitute for the malice

element of second-degree murder, for which the evidence was offered. Proof that defendant intentionally acted "in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm," *Goecke*, 457 Mich at 464, is not a matter of legal status. Even a stipulation to the fact of prior charges or convictions would not have been conclusive of or a sufficient substitute for the malice element. Defendant's prior incidents revealed that she already had several close calls involving drug-impaired driving, and thus should have recognized that she could not safely drive while using drugs. Accordingly, the trial court did not abuse its discretion by admitting the other-acts evidence.

VII

Finally, relying on *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant argues that judicial fact-finding at sentencing was improperly used to score OVs 3, 7, 9, and 19,[7] and thereby increase the floor of the guidelines minimum sentence range, in violation of her Sixth Amendment right to a jury trial. We disagree.

In *Apprendi*, 530 US at 490, the United States Supreme Court announced the general Sixth Amendment principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Alleyne*, 570 US at ___; 133 S Ct at 2155, the Supreme Court extended this rule to mandatory mini-

[7] We note that the trial court did not score OV 7 or 19.

mum sentences. The Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id*. at 133 S Ct at 2155.

In *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), our Supreme Court recently addressed the application of the *Apprendi* and *Alleyne* rules to Michigan's sentencing guidelines. The Court concluded that Michigan's sentencing guidelines violate the Sixth Amendment to the extent that they allow a sentencing judge to find by a preponderance of the evidence facts that are used to score the offense variables and, thereby, to mandatorily increase the floor of the guidelines minimum sentence range. *Id*. at 399. To remedy this constitutional violation, the Court held that the guidelines are "advisory only." *Id*. The Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Id*. at 391. The Court stated, however, that the guidelines remain "a highly relevant consideration in a trial court's exercise of sentencing discretion," *id*., and that sentencing judges remain obligated to determine the applicable guidelines range and to take the guidelines range into account when imposing a sentence, *id*. at 392.

The *Lockridge* Court further clarified that when, as in this case, the defendant did not object to the scoring of the offense variables at sentencing on *Apprendi/Alleyne* grounds, review is for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392. The Court also discussed how that standard is to be applied in other cases. As relevant to this case, the Court stated:

> First, we consider cases in which (1) facts admitted by the defendant and (2) facts found by the jury were suffi-

> cient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required. [*Id*. at 394-395.]

In this case, the trial court scored the sentencing guidelines for defendant's second-degree-murder conviction. Defendant's total OV score was 195 points and her PRV score was 37 points, placing her in OV level III (100+ points) and PRV level D (25-49 points). OV Level III is the highest level of offense severity on the applicable sentencing grid. MCL 777.61. Thus, as long as at least 100 OV points can be sustained on the basis of facts found by the jury beyond a reasonable doubt, defendant cannot establish prejudice from any error, and relief is not required. Defendant alleges that judicial fact-finding occurred in the scoring of OVs 3, 7, 9, and 19.[8]

The trial court assessed 50 points for OV 3, which is appropriate when (1) a victim was killed, (2) the "death results from the commission of a crime and the offense . . . involves the operation of a vehicle," and (3) "[t]he offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance." MCL 777.33(1)(b) and (2)(c)(*i*). Each of these facts was necessarily found by the jury beyond a reasonable doubt. The jury found defendant guilty of second-degree murder, which requires the death of a victim. The jury also found defendant guilty of OUIL causing death, which required the jury to find that defendant was operating a vehicle while under the

[8] She does not, however, challenge the accuracy of the scoring of those OVs.

influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof. MCL 257.625(1)(a). Thus, each of the facts necessary to support a 50-point score for OV 3 was necessarily found by the jury beyond a reasonable doubt. Accordingly, the trial court's scoring of OV 3 did not violate defendant's Sixth Amendment right to a jury trial.

The trial court also assessed 100 points for OV 9, which is appropriate when "[m]ultiple deaths occurred." MCL 777.39(1)(a). MCL 777.39(2)(b) indicates that 100 points are to be assessed only in homicide cases. The jury found defendant guilty of two counts each of second-degree murder. These verdicts reflect that the jury found beyond a reasonable doubt that multiple deaths occurred. Accordingly, the trial court's scoring of OV 9 did not violate defendant's Sixth Amendment right to a jury trial.

In sum, because facts found by the jury were sufficient to assess the minimum number of OV points necessary for defendant's placement in the D-III cell of the sentencing grid under which she was sentenced, there was no plain error and defendant is not entitled to resentencing or other relief under *Lockridge*.

Affirmed.

TALBOT, P.J., and FORT HOOD, J., concurred with WILDER, J.

HARPER WOODS RETIREES ASSOCIATION v
CITY OF HARPER WOODS

Docket No. 318450. Submitted February 4, 2015, at Detroit. Decided October 1, 2015, at 9:00 a.m.

Harper Woods Retirees Association and various individuals who have retired from employment with the city of Harper Woods brought an action for breach of contract against the city in the Wayne Circuit Court, claiming that defendant improperly made unilateral changes to their health insurance benefits. The court, Susan D. Borman, J., granted plaintiffs' motion for class certification but failed to identify the members of the class. The court also granted defendant's motion for summary disposition, relying on a Sixth Circuit Court of Appeals case that authorized employers to unilaterally alter retirees' vested health insurance coverage if the alterations are reasonable. The court granted defendant's motion because plaintiffs had failed to address the issue of reasonableness. Plaintiffs appealed in the Court of Appeals, which retained jurisdiction over the case and remanded it to the trial court with instructions to identify the class members and to provide them with the notice required under MCR 3.501(C). The class members were identified and given notice, and the Court of Appeals addressed plaintiffs' remaining arguments on appeal.

The Court of Appeals *held*:

1. The trial court erred by granting defendant's motion for summary disposition because an employer cannot unilaterally modify vested health insurance benefits provided to retirees under a collective bargaining agreement (CBA) or personal contract. The trial court based its decision on the ruling in *Reese v CNH America LLC*, 694 F3d 681 (CA 6, 2012). Federal circuit court decisions are not binding on state courts, and therefore, the trial court was not obligated to follow *Reese*'s holding. In addition, *Reese*'s conclusion that unilateral alterations to retirees' vested health insurance benefits were permitted as long as the alterations were reasonable occurred in a case in which the evidence indicated that the parties intended to permit such alterations.

Parties must be able to rely on the contractual language of the agreement to which they mutually assented.

2. A retiree's vested rights may not be altered without the retiree's consent. A right is vested when the retiree can show that (1) he or she had a contractual right to the claimed benefit that was to continue after the agreement's expiration and (2) the right was included in his or her respective contract at the time of retirement. However, the presumption that retirement benefits vest for the lifetime of a retiree violates the traditional rules of contractual interpretation. Traditional rules of contractual interpretation apply to collective bargaining agreements and the provision and duration of retirees' health insurance benefits. The duration of a retiree's benefits and the benefits to which the retiree is entitled depend on the language used in the CBA or personal contract under which the retiree claims the benefits.

3. Whether a retiree should continue to receive health insurance benefits, and the type of benefits he or she should receive, depends on the language of the CBA or personal contract under which the retiree was given the benefits. The case was remanded for the trial court to identify the specific CBA or personal contract under which each member of the class claims his or her health insurance benefits. The trial court must then apply ordinary contract principles to determine (1) whether the parties intended the healthcare benefits in each agreement to survive after the agreement expired or (2) whether the retiree's healthcare benefits terminated after the agreement expired so that defendant was permitted to alter the retiree's benefits under future contracts.

4. Plaintiffs claimed that a question of fact existed regarding whether defendant was in a state of financial crisis at the time it altered the retirees' health insurance coverage, but the trial court did not address this argument, which rendered it unpreserved. Even so, the reason why a breaching party failed to fulfill its contractual obligations is not an element in a breach of contract claim.

5. Plaintiffs' claim that defendant violated city ordinances when it altered retirees' healthcare benefits was not included in plaintiffs' statement of the questions presented, and therefore, the claim was not properly presented for appellate review.

Reversed and remanded.

CONTRACTS — COLLECTIVE-BARGAINING AGREEMENTS — RETIREES — HEALTHCARE BENEFITS.

An employer cannot unilaterally modify a retiree's vested health insurance benefits; alterations of a retiree's vested health insurance benefits are governed by traditional principles of contractual interpretation and the contractual language in the collective-bargaining agreement or personal contract under which the retiree claims the benefits.

Mark A. Porter & Associates (by *Mark A. Porter*) for plaintiffs.

Bellanca LaBarge PC (by *Sharon A. DeWaele*) for defendant.

Before: FORT HOOD, P.J., and JANSEN and GADOLA, JJ.

GADOLA, J. Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand for further proceedings consistent with this opinion.

I. FACTS

The Harper Woods Retirees Association (HWRA) is a nonprofit corporation composed of individuals who were once employed by defendant, and who retired between the 1980s and early 2000s. The individually named plaintiffs are retirees who hold the following positions within the HWRA: Jeffrey Manor, president; James Manor, treasurer; Judith DeKeyser, secretary; and Donald Kuczborski, trustee. According to plaintiffs' complaint, members of the HWRA obtained vested healthcare benefits through multiple collective bargaining agreements (CBAs) and personal contracts with defendant. These agreements identified specific health insurance plans, riders, and prescrip-

tion drug co-pays available to retirees.[1] Plaintiffs alleged that retirees previously received Blue Cross - Blue Shield of Michigan (BCBS-M) "Traditional," "Master Medical," or "Community Blue-1" insurance plans,

[1] Plaintiffs attached three CBAs to their complaint. The January 1, 2004 through December 31, 2006 CBA between defendant and the International Association of Firefighters, Local No. 1188, AFL-CIO stated the following:

> For any employee covered by this Agreement and his dependents, the City will pay the full cost of Blue Cross Preferred Provider Organization (PPO) Comprehensive Hospital Semi-Private Service with Riders D45NM, MM, ML, IMB, DCCR, Blue Shield MVF-1 service with $2.00 prescription drug program, and out of state reciprocity rider. Effective August 1, 1998, the prescription drug rider shall be $10.00.
>
> Upon an employee's retirement from employment by the City, and during the period of his retirement thereafter, . . . the City will pay the full cost of the above health care insurance coverages for such retiree and his spouse, until each has reached age 65 and, from and after his reaching age 65, shall pay the full cost of his Blue Cross/Blue Shield Care Insurance Plan which supplements his own Medicare Health Care coverage.
>
> * * *
>
> For retirees and their spouses, the insurance coverage shall continue to be the existing Traditional BCBS plan (#63049/905), provided however that for those employees retiring on or after October 1, 2005, the prescription co-pay shall be increased from $2 to $5.

The 2000 through 2002 CBA between defendant and the American Federation of State, County and Municipal Employees, Local No. 1107, stated the following:

> [F]or all retirees from the City's service who were members of this Local at the time of retirement from the City, the City will pay, during the term of this agreement, the full cost of Blue Cross Comprehensive Hospital, Semi-Private, Preferred Provider Organization, Service with Riders D, D45NM, MM, ML, Pap Smear and Ten Dollar ($10.00) Prescription Drug Program Rider and of Blue Shield MVF-1 Service.

The January 1, 2000 through December 31, 2002 CBA between defendant and the Police Officers Labor Council (Command Officers Unit) stated the following:

which guaranteed either no deductibles for treatment or "first dollar" deductibles of approximately $10 for office visits. Plaintiffs also claimed that some of their original health plans had a $2 deductible for generic prescriptions and a $5 deductible for name brand prescriptions.

On April 12, 2012, defendant announced plans to unilaterally alter its retirees' healthcare coverage. According to plaintiffs' complaint, defendant sought to move retirees under the age of 65 into a BCBS-M "Community Blue-2" insurance plan, and retirees over the age of 65 into a BCBS-M "Medicare Advantage, Mid-Option" insurance plan. Plaintiffs alleged that the new plans "would include co-pays and deductibles amounting to $1,000.00 to $1,500.00 per year, per retiree" and would require retirees who previously paid $2 and $5 co-pays for their prescriptions to pay $5 for generic prescriptions and $20 for name brand prescriptions.

In June 2012, individual retirees established the HWRA to oppose defendant's proposed changes. However, following two meetings between defendant and the HWRA, defendant maintained that its retiree healthcare benefits expired at the term end of the relevant CBAs, giving defendant the discretion to alter retiree health insurance coverage. On July 9, 2012, the city council approved defendant's alterations, and on August 1, 2012, the changes became effective.

> The City agrees to pay the premium of the retirees for the Blue Cross — Blue Shield Plan listed above except such plan shall be traditional rather than PPO, and to provide additional coverage for the employee's spouse . . . .
>
> The prescription drug rider for all retirees shall be a $ 2.00 co-pay plan.

In October 2012, plaintiffs filed a complaint alleging breach of contract including violation of the Contract Clauses of the United States Constitution. Plaintiffs sought a declaration that defendant breached its contracts, an injunction against further alteration of retiree benefits, and an order returning to retirees their previous health insurance coverage. Plaintiffs also sought class certification for the 88 members of the HWRA. The trial court initially refused to certify the membership of the HWRA as a class. However, following a motion hearing on June 28, 2013, the court instructed plaintiffs to reintroduce their motion for class certification, and instructed defendant to bring a motion for summary disposition on the question of whether a municipality may unilaterally alter the healthcare benefits of its retired employees.

At a hearing in September 2013, the court addressed both motions. First, the court granted plaintiffs' motion for class certification in part, defining the certified class to include all of defendant's employees who (1) were covered by a CBA at the time of retirement, or (2) had a personal contract with defendant at the time of retirement. However, the trial court did not identify the specific persons included in the class certification. Next, addressing defendant's motion for summary disposition, the court relied on the holding of the United States Court of Appeals for the Sixth Circuit in *Reese v CNH America LLC*, 694 F3d 681 (CA 6, 2012) to conclude as a matter of law that employers may unilaterally alter retirees' health insurance coverage provided in a CBA if the alterations are reasonable. Because plaintiffs had not challenged the reasonableness of defendant's health insurance alterations, the trial court granted defendant's motion.

Plaintiffs appealed as of right in this Court the trial court's summary disposition order. On appeal, plain-

tiffs argued that the lower court erred by granting defendant's motion for summary disposition, and that it failed to provide proper notice to class members after certifying the case as a class action. We held oral argument on the matter on February 4, 2015. Shortly thereafter, we issued an order remanding the case for the limited purpose of identifying the members of the certified class and providing them notice in compliance with MCR 3.501(C).[2] *Harper Woods Retirees Ass'n v City of Harper Woods*, unpublished order of the Court of Appeals, entered February 13, 2015 (Docket No. 318450). In July 2015, the trial court submitted an order on remand certifying the class and identifying the class members. Now that the members of the class have been identified, we address plaintiffs' remaining arguments on appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Defendant moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10), and the trial court did not specify under which rule it decided the motion. However, because the court decided defendant's motion on purely legal grounds without referring to evidence outside the pleadings, we review the motion under MCR 2.116(C)(8).[3] *Spiek v Dep't of*

[2] We also instructed the parties to submit supplemental briefing on the vesting of retirement benefits in light of the United States Supreme Court's recent decision in *M&G Polymers USA, LLC v Tackett*, 574 US ___; 135 S Ct 926; 190 L Ed 2d 809 (2015).

[3] In contract-based actions, any contracts attached to the complaint are considered part of the pleadings. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003); see also MCR 2.113(F)(2). Plaintiffs attached excerpts of 33 CBAs and six personal contracts to their response to the motion for summary dispo-

Transp, 456 Mich 331, 338; 572 NW2d 201 (1998); see also MCR 2.116(G)(5). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When reviewing the motion, courts must accept as true all well-pleaded factual allegations within the complaint. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A decision granting a motion under MCR 2.116(C)(8) is proper if the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 163. We review de novo questions regarding the interpretation of a contract. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

III. DISCUSSION

Plaintiffs first argue that the trial court erred by granting defendant's motion for summary disposition after concluding that under *Reese*, 694 F3d 681, defendant could unilaterally modify any health insurance benefits provided to retirees under its CBAs or personal contracts, regardless whether the rights had vested, as long as the modifications were reasonable. We agree.

In Michigan, "[t]he foundational principle of our contract jurisprudence is that parties must be able to rely on their agreements[, and this] applies no less strongly to collective bargaining agreements . . . ." *Macomb Co v AFSCME Council 25 Locals 411 & 893*,

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sition. The trial court did not consider these contracts in deciding the motion for summary disposition. Rather, the court concluded that, as a matter of law, an employer could unilaterally alter retiree healthcare benefits found in a CBA or personal contract if the alterations were reasonable.

494 Mich 65, 80; 833 NW2d 225 (2013). "A collective bargaining agreement, like any other contract, is the product of informed understanding and mutual assent." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996). When contractual language is unambiguous, courts must interpret and enforce the language as written because an unambiguous contract reflects, as a matter of law, the parties' intent. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). "[T]he principle of freedom to contract does not permit a party *unilaterally* to alter [an] original contract." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). Rather, when the alteration of a provision in a CBA "affects vested rights already accrued[, the change] may give rise to a cause of action in contract." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 530; 473 NW2d 652 (1991) (involving a change in compensation policy for work already preformed).

The trial court erred by concluding as a matter of law that defendant could unilaterally alter the health insurance benefits provided under its CBAs and personal contracts. Generally, unilateral alteration of contracts is prohibited because "mutuality is the centerpiece to waiving or modifying a contract . . . ." *Quality Prod*, 469 Mich at 364.[4] The trial court also erred by holding that the reasonableness of defendant's proposed alterations, in light of the city's alleged financial

[4] As a matter of law, the presence of a modification clause in a written contract also raises a presumption that a contract may not be modified absent mutual assent. See *Quality Prod*, 469 Mich at 374. Although plaintiffs did not attach the entirety of each CBA to their complaint, at least one of the attached CBAs includes a modification clause providing that the agreement would remain in full force and effect absent written notice, renegotiation, and "agreement upon a new contract."

crisis, was a proper basis on which to permit or refuse enforcement of the contractual provisions at issue. In Michigan, "[a] mere judicial assessment of 'reasonableness' is an invalid basis on which to refuse to enforce contractual provisions." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). Further, rising medical insurance costs and the city's financial situation are irrelevant to the inquiry because the fact that a contractual obligation "proved to be more onerous . . . than anticipated is no defense." *Johnston v Miller*, 326 Mich 682, 696; 40 NW2d 770 (1950).

By ruling that defendant could unilaterally alter any of its retirees' healthcare benefits as a matter of law, the trial court found the Sixth Circuit's decision in *Reese*, 694 F3d 681, controlling. In *Reese*, retirees brought suit against their employer seeking a declaration that they were entitled to lifetime health insurance benefits under their CBAs and an injunction preventing their employer from altering the level of healthcare benefits then in effect. The Sixth Circuit held that when an employer and its retirees "did not perceive the relevant CBAs as establishing fixed, unalterable benefits," an employer "could make 'reasonable' changes to the healthcare plan covering eligible retirees." *Id*. at 684. The court described "reasonable" alterations as those that are "reasonably commensurate" with the former insurance plan, those that are reasonable considering what medical care is currently available, and those that provide benefits roughly similar to the benefits provided to current employees. *Id*. at 685. The court then offered a nonexhaustive list of factors for the trial court to consider when determining if alterations are reasonable. *Id*. at 685-686.

In this case, the trial court was not bound to follow *Reese*. "Although lower federal court decisions may be

persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Further, *Reese* does not stand for the proposition that an employer may always unilaterally alter its retirees' healthcare benefits under a CBA, regardless of the CBA's specific language, as long as the alterations are reasonable. Rather, the *Reese* court indicated that a retiree's right to health insurance benefits under a CBA could be unilaterally altered if evidence indicated the parties intended to permit such alterations, not because vested health insurance benefits under a CBA are unilaterally alterable as a matter of law.[5] Thus, defendant and the trial court erred by interpreting *Reese* as establishing an absolute right for employers to unilaterally alter health insurance coverage for retirees.

Although the trial court erred in concluding that an employer may, as a matter of law, unilaterally alter any health insurance benefits included in a CBA or personal contract as long as the alterations are reasonable, the preliminary question remains whether plain-

[5] The Sixth Circuit also adopted this interpretation of *Reese* in *United Steel, Paper & Forestry, Rubber, Mfg Energy, Allied Indus & Serv Workers Int'l Union AFL-CIO-CLC v Kelsey-Hayes Co*, 750 F3d 546, 554 (CA 6, 2014) ("[In *Reese*,] the scope of the vested right to health care could be unilaterally altered because that is what the evidence indicated the parties intended in that case, not because all vested health care rights in all CBAs are subject to unilateral alteration as a matter of law."). The Sixth Circuit recently vacated its decision in *United Steel* on other grounds and remanded the case to the district court for reconsideration in light of *Tackett*'s overruling of *UAW v Yard-Man, Inc*, 716 F2d 1476 (CA 6, 1983). *United Steel, Paper & Forestry, Rubber, Mfg Energy, Allied Indus & Serv Workers Int'l Union AFL-CIO-CLC v Kelsey-Hayes Co*, 795 F3d 525 (CA 6, 2015). In *Tackett*, 574 US at ___; 135 S Ct at 937; 190 L Ed 2d at ___, the United States Supreme Court overruled *Yard-Man*, concluding that a judicially created inference that parties intended benefits under a CBA to vest for life upon retirement was inconsistent with ordinary principles of contract law.

tiffs had vested rights to the health benefits they now claim. " 'Under established contract principles, vested retirement rights may not be altered without the [retiree]'s consent.' " *Butler v Wayne Co*, 289 Mich App 664, 672; 798 NW2d 37 (2010), quoting *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 181 n 20; 92 S Ct 383; 30 L Ed 2d 341 (1971) (alteration omitted). However, in order to demonstrate that a benefit conferred in a CBA or personal contract is deemed vested, a retiree must show that (1) he or she had a contractual right to the claimed benefit that was to continue after the agreement's expiration, and (2) the right was included in his or her respective contract at the time of retirement. See *Butler*, 289 Mich App at 672.

Plaintiffs suggest that their right to the specific healthcare benefits included in their CBAs and contracts continued indefinitely after retirement, regardless whether the explicit terms of the contracts indicated that the parties intended those benefits to continue after the agreements expired. Such a position is inconsistent with ordinary principles of contract law.

In *M&G Polymers v Tackett*, 574 US ___; 135 S Ct 926, 932; 190 L Ed 2d 809 (2015), the United States Supreme Court rejected the Sixth Circuit's decision in *UAW v Yard-Man*, 716 F2d 1476 (CA 6, 1983), which held that in the absence of contrary extrinsic evidence, courts should presume that retiree benefits provided in a CBA are guaranteed for the lifetime of any employee who retires under the CBA. The *Yard-Man* court "inferred that parties would not leave retiree benefits to the contingencies of future negotiations, and that retiree benefits generally last as long as the recipient remains a retiree . . . [which] 'outweigh[ed] any contrary implications derived from a routine duration clause terminating the agreement

generally.' " *Tackett*, 574 US at ___; 135 S Ct at 936, quoting *Yard-Man*, 716 F2d at 1482-1483 (second alteration in original). Thus, although the *Yard-Man* court recognized that "traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation," the court concluded that the duration of the conferred benefit was not subject to this conventional restraint. *Tackett*, 574 US at ___; 135 S Ct at 936 (quotation marks and citation omitted).

In *Tackett*, the Supreme Court overruled *Yard-Man*, holding that the presumption that retirement benefits vest for the lifetime of a retiree violates traditional rules of contract interpretation. The Supreme Court explained that under traditional contract interpretation principles, "courts should not construe ambiguous writings to create lifetime promises," and that generally, " 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.' " *Tackett*, 574 US at ___; 135 S Ct at 936-937, quoting *Litton Fin Printing Div, Litton Business Sys, Inc v NLRB*, 501 US 190, 207; 111 S Ct 2215; 115 L Ed 2d 177 (1991). The Supreme Court noted that traditional contract principles do not "preclude the conclusion that the parties intended to vest lifetime benefits for retirees" because "a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration." *Tackett*, 574 US at ___; 135 S Ct at 937 (quotation marks and citation omitted; alterations in original). However, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id*. at ___; 135 S Ct at 937. We conclude that the Supreme Court's reasoning in *Tackett* is consistent with Michigan's contract jurispru-

dence regarding CBAs, which applies with equal force in both the public and private sectors. As our Supreme Court has explained:

> The foundational principle of our contract jurisprudence is that parties must be able to rely on their agreements. This principle applies no less strongly to collective bargaining agreements: when parties to a collective bargaining agreement bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. A party to the collective bargaining agreement has a right to rely on the agreement as the statement of its obligations on any topic covered by the agreement. [*AFSCME Council 25*, 494 Mich at 80 (quotation marks and citations omitted).]

The task, then, is to examine each of the CBAs and personal contracts in effect at the time of each respective class member's retirement, and to determine (1) whether the language governing retiree healthcare benefits indicates that the parties intended the same benefits to continue after expiration of the agreements or (2) whether the benefits terminated after expiration of the agreements, so that defendant was permitted to alter the benefits under future contracts. See *Butler*, 289 Mich App at 672. Below, plaintiffs attached excerpts of 33 CBAs and six purported personal contracts to their response to defendant's motion for summary disposition. The trial court did not address any of these agreements when issuing its decision granting summary disposition to defendant; instead, the court ruled that alteration of health insurance benefits was appropriate as a matter of law as long as the alterations were reasonable. At the time, the members of the class had not been identified. In fact, they were only identi-

fied in an order from the trial court dated July 27, 2015, following the remand from this Court.

There is currently no evidence before us indicating which contracts apply to which class members based on the members' retirement dates, whether all the relevant CBAs are included in the record, and whether additional provisions in the CBAs beyond the excerpts included below are necessary to properly interpret the relevant contractual provisions. Accordingly, the lower court record has not been sufficiently developed to permit this Court to engage in an independent review of the obligations contained in each of the agreements. Therefore, we remand this case to the trial court for further proceedings consistent with this opinion.

On remand, we instruct the trial court to determine which contract applies to each individual class member, and then to apply ordinary contract principles to determine (1) whether the parties intended the retiree healthcare benefits identified in each respective agreement to survive the expiration of the CBA or (2) whether the retirees' rights to the specifically identified healthcare benefits terminated upon expiration of the agreement, so that defendant was permitted to alter the benefits under future contracts.[6]

IV. UNPRESERVED CLAIMS

Finally, plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition because a question of fact existed regarding whether

[6] We emphasize that the outcomes, i.e., whether a retiree's right to specific health insurance coverage extends beyond the expiration of the agreement under which he or she retired, may not be the same for each CBA and personal contract. Rather, the outcomes must be dictated by the application of traditional principles of contract interpretation to the language of each respective agreement.

defendant was in a state of financial crisis at the time it altered plaintiffs' health insurance coverage. The lower court did not address this issue in deciding defendant's motion for summary disposition, rendering it unpreserved. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The reason why a breaching party failed to fulfill its contractual obligations is not an element in a breach of contract claim. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Because defendant's financial status was irrelevant to whether it breached its contractual duties, we choose not to address the parties' arguments regarding this issue on appeal.

Plaintiffs further argue that defendant violated city ordinances by altering retirees' healthcare benefits. However, this issue was not raised in plaintiffs' statement of the questions presented. Issues not specifically raised in an appellant's statement of questions presented are not properly presented to this Court. *Grand Rapids Employees Indep Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Accordingly, we also decline to address this issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and JANSEN, J., concurred with GADOLA, J.

PEOPLE v SLEDGE

Docket No. 324680. Submitted September 10, 2015, at Detroit. Decided October 1, 2015, at 9:05 a.m.

Carla Sledge and Steven M. Collins were indicted in the Wayne Circuit Court on two counts of misconduct in office and two counts of willful neglect of duty related to their involvement in the failure of the Wayne County Jail Project. The court, Vonda R. Evans, J., issued an order sua sponte that prohibited all potential trial participants from making any extrajudicial statements to the media or other individuals for the purpose of dissemination by public communications (the gag order). The Detroit Free Press (Free Press) intervened to challenge the order restraining trial participants from speaking to the media. Defendants did not contest the trial court's gag order. The trial court granted the Free Press's motion to intervene but denied its motion to vacate the gag order. The Free Press applied in the Court of Appeals for leave to appeal the trial court's denial of its motion, and the Court denied the Free Press leave to appeal and the Free Press's motion for reconsideration. The Free Press filed an emergency motion for leave to appeal in the Michigan Supreme Court, and in lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 497 Mich 979 (2015).

The Court of Appeals *held*:

1. The trial court improperly denied the Free Press's motion to vacate the gag order. The gag order prohibiting all potential trial participants from making any extrajudicial statements to the media or other individuals for the purpose of dissemination by public communications was vague and overbroad, and it constituted a prior restraint on freedom of speech and freedom of the press in violation of the First Amendment of the United States Constitution and Article 1, § 5 of Michigan's 1963 Constitution. There exists a heavy presumption that an order constituting a prior restraint is unconstitutional. In this case, the trial court failed to overcome the presumption of the order's unconstitutionality. The trial court did not conduct the proper analysis of the

evidence and applicable law, and it further failed to make findings of fact and conclusions of law to support its decision.

2. The trial court properly ruled that the Free Press had standing to contest the imposition of the gag order. The Free Press had standing because it qualified as a recipient of speech and as a news gatherer. Where there are willing speakers, the First Amendment freedoms apply both to the source of information and to the recipients of that information. The First Amendment further protects a news gatherer's right to obtain news. The gag order in this case infringed the Free Press's right to gather news because it silenced the sources from which the news would be gotten.

3. A gag order must still be justified even when the order does not constitute a prior restraint. In this case, the trial court's reasoning for imposing the gag order did not satisfy the lower standard that applies when the restrictions placed on speech do not constitute a prior restraint. That is, the trial court's reasoning failed to establish even that there was a reasonable likelihood that pretrial publicity would prejudice defendants' right to a fair trial.

4. The trial court failed to conduct an analysis of the evidence before imposing the gag order. To first determine whether any action should be taken to protect a defendant's Sixth Amendment right to a fair trial in the face of pretrial publicity, a trial court must examine (1) the nature and extent of pretrial news coverage, (2) whether the possible prejudice to a defendant's right to a fair trial could be mitigated by other measures, and (3) whether a restraining order would be effective at preventing the threatened danger to the defendant's right to a fair trial. In this case, the trial court made no such examination.

5. The trial court failed to explore other possible remedies for the effects of pretrial publicity. Before imposing a gag order, a trial court is required to consider other available remedies to determine whether an alternative to the gag order might effectively minimize the possibility of prejudice due to pretrial publicity. These remedies include a change of venue, postponement of trial, specific voir dire on the issue, special jury instructions, or jury sequestration. In this case, the trial court failed in its duty to assess any reasonable alternatives to imposing restraints on the First Amendment rights to freedom of speech, freedom of expression, and freedom of the press.

Reversed.

1. CONSTITUTIONAL RIGHTS — FIRST AMENDMENT — FREEDOM OF SPEECH — PRIOR RESTRAINT.

An order prohibiting all potential trial participants from making any extrajudicial statements to the media or other individuals for the purpose of dissemination by public communications is vague and overbroad and constitutes a prior restraint on freedom of speech, freedom of expression, and freedom of the press in violation of the First Amendment of the United States Constitution and Article 1, § 5 of Michigan's 1963 Constitution; there exists a heavy presumption that an order constituting a prior restraint is unconstitutional.

2. CONSTITUTIONAL RIGHTS — SIXTH AMENDMENT — RIGHT TO A FAIR TRIAL — PRETRIAL PUBLICITY.

To justify a prior restraint on speech in light of pretrial publicity, a trial court must examine (1) the nature and extent of pretrial news coverage, (2) whether the possible prejudice to a defendant's Sixth Amendment right to a fair trial could be mitigated by other measures, and (3) whether a restraining order would be effective at preventing the threatened danger to the defendant's right to a fair trial; the trial court must also narrowly tailor the terms of the restraining order.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Timothy A. Baughman*, and *Robert A. Moran* and *James Gonzales*, Assistant Prosecuting Attorneys, for the people.

Gurewitz & Raben, PLC (by *Harold Gurewitz*), for Carla Sledge.

James C. Thomas for Steven M. Collins.

Herschel P. Fink for intervenor Detroit Free Press, Inc.

Before: GADOLA, P.J., and JANSEN and BECKERING, JJ.

JANSEN, J. In Docket Nos. 324680 and 324681, intervenor, the Detroit Free Press, Inc. (Free Press), appeals by leave granted the trial court's order denying

its motion to vacate the order precluding "all potential trial participants" in the cases pending against defendants Carla Sledge and Steven M. Collins from commenting to the media about the case (gag order). We reverse the trial court's denial of the Free Press's motion to vacate the gag order, and we vacate the gag order.

I. FACTS AND PROCEDURAL HISTORY

The Wayne County Jail Project, a 2010 project budgeted at $300 million to construct a jail in downtown Detroit, came to a halt when construction was only about a quarter complete because of approximately $100 million in cost overruns. The failure of the project, in spite of the fact that $220 million of the money budgeted for the project was spent, has been the subject of public and media scrutiny.[1] The Free Press is a newspaper interested in publishing articles regarding the criminal charges stemming from the failed jail project. On September 12, 2014, defendant Sledge, the former Wayne County Chief Financial Officer, and defendant Collins, the Assistant Wayne County Corporation Counsel, were each indicted on two counts of a common-law offense (misconduct in office), MCL 750.505, and two counts of willful neglect of duty, MCL 750.478, stemming from the Wayne County Jail Proj-

[1] See, e.g., Walker, *Wayne County authority had little say over $300M jail project*, Detroit Free Press (July 14, 2013), p 4A; The Detroit Free Press Editorial Board, *Wayne Co. 'fail jail' construction may be criminal*, Detroit Free Press (September 16, 2014), <http://www.freep.com/story/opinion/editorials/2014/09/15/editorial-wayne-co-fail-jail-construction-may-be-criminal/15691347/> (accessed September 17, 2015) [http://perma.cc/3ZRS-DCMR]; Walker, *3 plead not guilty to wrongdoing in Wayne Co. jail case*, Detroit Free Press (September 23, 2014), <http://www.freep.com/story/news/local/michigan/wayne/2014/09/23/wayne-county-jail-arraigments/16099439/> (accessed September 17, 2015) [http://perma.cc/SG48-JC2Y].

ect. The indictment alleged that defendants intentionally misled the Wayne County Commission and the Wayne County Building Authority regarding "the cost(s) and/or financial status of the Wayne County Consolidated Jail Project," and willfully neglected to fully and honestly inform the Wayne County Commission and the Wayne County Building Authority regarding the project.[2] On September 30, 2014, the trial court, sua sponte, sealed the court record and entered an order, which stated:

> IT IS HEREBY ORDERED that all potential trial participants shall be prohibited from making any extra judicial [sic] statements regarding this case to members of the media or to any individual(s) for the purpose of for [sic] disseminating by public communications.
>
> IT IS FURTHER ORDERED that potential trial participants shall include all attorneys for the prosecution and defense, the defendant and any agent acting on behalf of the attorneys ordered.

The court did not hold a hearing or make any findings of fact when it sealed the record and entered the order.

On October 6, 2014, the Free Press's attorney sent a letter to the trial court, urging the court to vacate the gag order prohibiting all potential trial participants from making extrajudicial statements to the media regarding the case. The letter argued that the great public interest in the case outweighed any prejudice to defendants' right to a fair trial. The letter cited several cases in support of the request. On October 14, 2014, the Free Press filed formal motions to intervene in the case and to vacate the gag order. The Free Press requested leave to intervene "pursuant to MCR 8.116(D) and applicable United States Supreme Court precedents giving the media standing to oppose restraints

[2] The charges against Collins were dismissed on September 4, 2015.

on its ability to gather news . . . ." In an accompanying brief, the Free Press argued that the gag order was overbroad and constituted an unconstitutional prior restraint on speech.

On October 31, 2014, the trial court held a hearing on the Free Press's motions to intervene and to vacate the gag order. The attorney for the Free Press emphasized that the gag order was overbroad and covered "anybody potentially involved" in the case. He argued that the gag order constituted a prior restraint on the media's ability to report on the news and that the gag order was entered without a request from one of the parties and without findings by the court. He stated that the court file should be unsealed. Sledge's attorney stated that he appreciated the trial court's efforts to ensure a fair trial, but he could not disagree with the legal authority cited by the Free Press. He noted that he would leave the issue up to the trial court's discretion and did not specifically request that the court uphold the gag order. Counsel for Collins stated that the court entered the gag order in order to protect his client's right to a fair trial and noted that his client had "a right to a jury that is untouched by bias," but he did not specifically request that the court uphold the gag order. The prosecutor also agreed that the trial court issued the gag order to protect defendants' right to a fair trial, but did not request that the trial court uphold the gag order.

Ruling from the bench, the trial court granted the Free Press's motion to unseal the record, but the court denied the Free Press's motion to vacate the gag order. The trial judge questioned whether the Free Press had standing to challenge the gag order, but ultimately found that the Free Press had standing. However, the judge noted that the Free Press had access to the court

proceedings and that the gag order was not directed at the media. The judge reasoned that the grand jury process is a secretive process and does not involve safeguards to ensure that the information presented is properly tested and that the people against whom the grand jury witnesses testified will not find out what the witnesses said. The judge also noted that she had a duty to ensure that the right to a fair trial was not prejudiced and reasoned that pretrial publicity would deny each defendant the right to a fair trial. The judge stated that she sealed the court file because she believed that the grand jury transcripts would be placed in the file. The trial judge stated, "This is the Court's first impression with that of a grand jury transcript or testimony. I didn't know how the process went." The prosecutor explained that the grand jury material would not be part of the official court file. The court then determined that it would unseal the court file.

In an opinion and order on the Free Press's motion to vacate the gag order issued on the same day, the trial court determined that the Free Press had standing to intervene in the action as a recipient of speech. The court further determined that there was not a prior restraint on speech because the order did not prevent the Free Press from speaking or from reporting on the proceedings. To justify the gag order, the trial court emphasized that the grand jury process involved secrecy and that the participants in a grand jury proceeding were often "forbidden" to disclose details of the proceeding. The trial court stated that it had "the right to balance the government's interest in secrecy against public disclosure," and that disclosure could "have a chilling effect on those who have testified to be frank and candid." The court further noted that disclosure could make it difficult to impanel a fair and impartial jury. Finally, the court reasoned that pretrial

publicity was reasonably likely to deprive defendants of a fair trial. Thus, the court ruled that the gag order was constitutional. Also, on the same day, the trial court issued an order unsealing the record.

On November 19, 2014, the Free Press filed an application for leave to appeal in this Court the trial court's decision on the motion to vacate the gag order. On December 4, 2014, in two identical orders, this Court denied the Free Press's application for leave to appeal, stating in part:

> The gag order placed no direct restraint of any kind on the Free Press and, therefore, the Free Press cannot claim that the gag order is an impermissible prior restraint. Nevertheless, the gag order issued here, and in particular, the extension of the order to " . . . all potential trial participants . . ." conceivably implicates First Amendment rights. However, the Free Press has not identified any willing speaker who feels restrained as a result of this order. Thus, this application is a mere generalized challenge to a First Amendment interest.

See *People v Sledge*, unpublished order of the Court of Appeals, entered December 4, 2014 (Docket No. 324680); *People v Collins*, unpublished order of the Court of Appeals, entered December 4, 2014 (Docket No. 324681). In two identical orders dated January 12, 2015, this Court also denied the Free Press's motion for reconsideration of the orders denying the Free Press's application for leave to appeal. See *People v Sledge*, unpublished order of the Court of Appeals, entered January 12, 2015 (Docket No. 324680); *People v Collins*, unpublished order of the Court of Appeals, entered January 12, 2015 (Docket No. 324681). On February 23, 2015, the Free Press filed an emergency application for leave to appeal in the Michigan Supreme Court. On March 27, 2015, the Michigan Supreme Court vacated this Court's orders, and in lieu of

granting leave to appeal, remanded the case to this Court pursuant to MCR 7.302(H)(1) for consideration as on leave granted. *People v Sledge*, 497 Mich 979 (2015). Shortly after the remand, this Court consolidated Docket Nos. 324680 and 324681 for review on appeal. See *People v Sledge*, unpublished order of the Court of Appeals, entered April 1, 2015 (Docket Nos. 324680 and 324681).

II. FIRST AMENDMENT FREEDOMS

The Free Press argues that the gag order constituted an unconstitutional prior restraint on the freedom of speech and the freedom of the press guaranteed by the First Amendment. We agree.

We review a trial court's decision on a motion to intervene for an abuse of discretion. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). " 'An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.' " *Id*. (citation omitted). Constitutional questions are reviewed de novo. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009). Whether a party has standing is a legal question that we also review de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

The United States and Michigan Constitutions guarantee freedom of speech and freedom of the press. US Const, Am I; Const 1963, art 1, § 5. The ability to gather news is entitled to at least some First Amendment protection. *Branzburg v Hayes*, 408 US 665, 681; 92 S Ct 2646; 33 L Ed 2d 626 (1972). The United States Supreme Court has recognized the important role that the press plays in the administration of justice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. [*Nebraska Press Ass'n v Stuart*, 427 US 539, 559-560; 96 S Ct 2791; 49 L Ed 2d 683 (1976) (quotation marks and citation omitted).]

The First Amendment generally protects against an order that constitutes a prior restraint on speech. See *id*. at 556. The gag order in this case constitutes a prior restraint on the freedom of speech and the freedom of the press, and the trial court failed to justify the order—that is, the trial court failed to overcome the heavy presumption of the order's unconstitutionality.

A. STANDING

The trial court correctly determined that the Free Press had standing to challenge the gag order. " 'To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected.' " *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (citation omitted). The "party must have 'a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . .' " *Id*. (citation omitted; omission in original). " 'A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Id*. (citation omitted).

The fact that the Free Press had standing to challenge the gag order was uncontested in the trial court and is uncontested on appeal. Nevertheless, we recog-

nize that the Free Press had standing to challenge the gag order as a recipient of speech and as a news gatherer. "Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 756; 96 S Ct 1817; 48 L Ed 2d 346 (1976). In *In re Application of Dow Jones & Co, Inc*, 842 F2d 603, 604, 607 (CA 2, 1988), the United States Court of Appeals for the Second Circuit determined that the news agencies involved in the case had standing to challenge a gag order prohibiting trial participants from speaking with the press since the district court found that the trial participants made extensive extrajudicial statements before the restraining order was issued. The Second Circuit noted, "It is hard, in fact, to imagine that there are no willing speakers. Without them there would be no need for a restraining order; it would be superfluous." *Id*. at 607.[3]

Similarly, in this case, the trial court cited the "extensive media coverage" of the Wayne County Jail Project as a reason for denying the Free Press's motion to vacate the gag order. The trial court's statement and imposition of a gag order including "all potential trial participants" necessarily implied that there were willing speakers that the court intended to preclude from speaking. See *Dow Jones*, 842 F2d at 607. Furthermore, the Free Press identified at least one willing speaker who felt restrained because of the gag order. Wayne County Commissioner Raymond Basham

[3] " 'Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues.' " *Fed Home Loan Mtg Ass'n v Kelley (On Reconsideration)*, 306 Mich App 487, 494 n 7; 858 NW2d 69 (2014) (citation omitted).

signed a declaration in which he stated that he reasonably believed that he could be a potential trial participant, and that he was a willing speaker who felt restrained from making statements to the media and to his constituents as a result of the gag order. Basham also stated that the gag order prevented him from obtaining information necessary to carry out his duties as chair of the Audit Committee, including discussing the audit of the project with the Wayne County Auditor General. Therefore, the Free Press established standing as a recipient of speech. See *Virginia State Bd of Pharmacy*, 425 US at 756; *Barclae*, 300 Mich App at 483.[4]

Furthermore, the Free Press had standing to challenge the gag order as a news gatherer. In *Branzburg*, the United States Supreme Court recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 US at 681. In *CBS, Inc v Young*, 522 F2d 234, 237-238 (CA 6, 1975), the United States Court of Appeals for the Sixth Circuit held that a gag order affected the right of a news organization to gather news, even though the news organization was not a party to the civil action. The court reasoned that the gag order prohibited the news media from access "to

[4] Although this Court's review is generally limited to the lower court record, the trial court found the Free Press had standing to challenge the gag order, and the court did not require the Free Press to demonstrate that there was a willing speaker. The Free Press attached Basham's declaration to its motion for reconsideration of its application for leave to appeal in this Court after this Court noted in its orders denying leave to appeal that the Free Press failed to identify a willing speaker. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005) (stating that a party may not expand the record on appeal). Therefore, we consider the declaration as support for the unchallenged argument on appeal that the Free Press had standing as a recipient of speech.

important sources of information about the trial." *Id.* at 237. The court noted, "The protected right to publish the news would be of little value in the absence of sources from which to obtain it." *Id*. at 238. Similarly, in this case, the gag order was not directed at the Free Press or the media in general. However, the gag order cut the Free Press off from access to important sources of information because it prohibited any potential trial participant from speaking with the news media regarding the case. See *id*. As with the plaintiff in *CBS*, the right of the Free Press to publish the news is of little value without sources from which to obtain the news. See *id*. Therefore, the Free Press had standing to challenge the gag order as a gatherer of news and a recipient of speech. See *CBS*, 522 F2d at 237-238.

B. PRIOR RESTRAINT

The gag order constituted an unconstitutional prior restraint on freedom of speech and freedom of the press. Prior restraints constitute "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 US at 559. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id*. The damage of a prior restraint is especially great when the prior restraint prevents the media from publishing news stories and commentary on current events. *Id*. Thus, a prior restraint on speech is subject to the closest scrutiny, and there is a heavy presumption that a prior restraint on speech is unconstitutional. See *CBS*, 522 F2d at 238. "To justify imposition of a prior restraint, the activity restrained must pose a clear and present danger, or a serious or imminent threat to a protected competing interest." *Id*. "The restraint must be narrowly drawn

and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Id*.

In *CBS*, the Sixth Circuit held that the gag order entered in a civil case constituted a prior restraint on the freedom of speech. *CBS*, 522 F2d at 240. The order at issue in *CBS*, provided that "in addition to all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates are hereby ORDERED to refrain from discussing in any manner whatsoever these cases with members of the news media or the public." *Id*. at 236. Notwithstanding the fact that the gag order did not directly prohibit CBS or any other news entity from speaking, the Sixth Circuit held that the gag order "constitute[d] a prior direct restraint upon freedom of expression." *Id*. at 239. The court reasoned that the order was vague and overbroad because it prevented all parties and their relatives, close friends, and associates from speaking about the case. *Id*. at 239-240. The court observed, "Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives." *Id*. at 239. The court further noted that the gag order applied to a broad group of people and prohibited all discussions regarding the case without regard to the content of the discussions. *Id*. Finally, the court concluded that the gag order impaired CBS's right to obtain information regarding the trial. *Id*.

Similarly, the vague and overbroad gag order at issue in this case constitutes an impermissible prior restraint upon the freedom of expression. The gag order prohibits "all potential trial participants" from

making any extrajudicial statements to the media. Although the gag order adds, "[P]otential trial participants shall include all attorneys for the prosecution and defense, the defendant and any agent acting on behalf of the attorneys ordered," the gag order does not limit the phrase "all potential trial participants" to the attorneys, the defendants, and agents acting on behalf of the attorneys. Instead, the precise scope of the gag order is unclear. The Free Press "would be at a loss to know with any degree of certainty what persons were embraced by these terms." See *CBS*, 522 F2d at 239. Thus, the vague and overbroad scope of people covered by the gag order indicates that it is an impermissible prior restraint on the Free Press's freedom of expression. See *id*. at 240. Furthermore, the subject matter of the gag order is equally vague and overbroad. The gag order prohibits *any* extrajudicial statements regarding the case, regardless of the content of the discussions. See *id*. at 239-240. Statements are prohibited "whether prejudicial or innocuous, whether subjective or objective, [and] whether reportorial or interpretive." See *id*. Thus, the order is incredibly overbroad and vague, and it constitutes a prior restraint on freedom of expression. See *id*. at 240. The gag order also constitutes a prior restraint on freedom of the press. Although the gag order does not directly prohibit the media from discussing the case, it prohibits the most meaningful sources of information from discussing the case with the media. See *id*. at 239. Therefore, the right of the Free Press to obtain information from all potential trial participants is impaired. See *id*.

C. JUSTIFICATION FOR GAG ORDER

The gag order also fails under the strict scrutiny standard to overcome the heavy presumption of uncon-

stitutionality attached to all prior restraints. See *CBS*, 522 F2d at 238. The trial court reasoned in its opinion and order denying the Free Press's motion to vacate the gag order that the possible prejudice to each defendant's Sixth Amendment right to a fair trial justified the order. A defendant in a criminal case has the right to a fair trial by a panel of impartial jurors. *Nebraska Press*, 427 US at 551. However, "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id*. at 561. A prior restraint on a First Amendment right will be upheld only if there is a clear showing that the exercise of the First Amendment right will interfere with the right to a fair trial. See *CBS*, 522 F2d at 241. In order to determine whether the right to a fair trial justified the prior restraint, a court

> must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. [*Nebraska Press*, 427 US at 562.]

There was no clear showing that the exercise of First Amendment rights would interfere with defendants' right to a fair trial. Instead, the trial court did not make any findings of fact or conclusions of law when it entered the gag order. The court failed to consider the nature and extent of the pretrial news coverage, whether the gag order would prevent the danger to defendants' right to a fair trial, whether there were any willing speakers in this case, and whether there were any effective alternatives to the gag order. Thus,

the trial court failed to justify the prior restraint when it issued the gag order. See *Nebraska Press*, 427 US at 562; *In re Application of the New York Times Co*, 878 F2d 67, 68 (CA 2, 1989) (reversing a gag order preventing counsel in a criminal case from speaking to the press and noting that the district court failed to make a finding with regard to whether a willing speaker existed); *CBS*, 522 F2d at 238.[5]

Additionally, the trial court failed to adequately justify the gag order in its opinion and order denying the Free Press's motion to vacate the gag order. In its opinion and order, the trial court identified pretrial publicity and the grand jury process as the two main reasons for entering the gag order:

> The charges brought against the defendants at bar Carla Sledge and Steven Collins where [sic] a result of an indictment by a one man grand jury. The grand jury process is one of secrecy which is designed to evaluate a prosecutor's evidence and decide whether it supports charging someone accused of a crime. Numerous witnesses are interviewed in secrecy, many without the benefit of attorneys present at the time there [sic] testimony is taken; the safe guards [sic] afforded by the Michigan Rules of evidence don't apply in gathering the information.
>
> Even after the grand jury is concluded participants, not including witnesses many times are forbidden from disclosing matters related to the grand jury.

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[5] We note that unlike the facts in *Dow Jones*, defendants in this case did not request the gag order or urge the trial court to affirm it. Furthermore, the gag order in *Dow Jones* only prevented the attorneys, the defendants, and the agents and representatives of the attorneys from making any extrajudicial statement regarding the case, while the gag order in this case prohibits all potential trial participants from making any extrajudicial statement regarding the case to the media or an individual for the purpose of public dissemination.

> The Court has the right to balance the government's interest in secrecy against public disclosure, to assure that the people against whom they testify would [not] find out [or] it would have a chilling effect on those who have testified to be frank and candid. The further dissemination of this information that has not been properly safeguarded by the Michigan Rule[s] of Evidence could result in an inability to secure a fair and impartial jury.
>
> Because of the extensive media coverage of the now defunct Wayne County Jail project has received [sic] it is this Court[']s belief that there is a reasonable like hood [sic] that pretrial publicity will prejudice and deny the criminal defendants at bar . . . a fair trial.

The trial court erred by finding that the gag order was necessary to maintain the secrecy of the grand jury inquiry and to ensure that defendants received a fair trial. Initially, it is apparent that the trial judge's decision was informed by the fact that she was unaware of the grand jury process. For instance, the trial judge stated that she decided to close the file sua sponte to prevent public disclosure of the "grand jury transcript or testimony," which the court assumed would be included in the lower court file. This assumption was incorrect. Disclosure of testimony and exhibits used during a grand jury inquiry is automatically prohibited under statute, making sealing unnecessary. See MCL 767.19f(1) ("Except as otherwise provided by law, a person shall not publish or make known to any other person any testimony or exhibits obtained or used, or any proceeding conducted, in connection with any grand jury inquiry."). Attempting to convey this fact to the trial court, the prosecutor explained that the chief judge would review the materials considered in the grand jury proceeding and that the discovery materials would either be released to the parties or sealed and separated from the official court file. The grand jury testimony of witnesses who will testify at

trial is released to the defendant, but not filed with the court or released to the public at large. See MCL 767.19f(1); MCL 767.19g(2) (describing the process for disclosure of specified grand jury testimony to the defendant).

The trial court's concerns about the Michigan Rules of Evidence and witness identification are illogical in light of the fact that there will be a public trial. If the prosecutor or defendants intend to use at trial some of the grand jury materials released to them, the trial court considers the safeguards imposed by the Michigan Rules of Evidence before those materials are admitted. Defendants are also entitled to know the identity of the grand jury witnesses who testified against them if those same witnesses will testify at trial. See *People v Bellanca*, 386 Mich 708, 712; 194 NW2d 863 (1972), and MCL 767.19g(2).[6] Presumably, the prosecutor relays this fact to witnesses before they agree to testify at the grand jury inquiry. If disclosure of a witness's identity caused a "chilling effect" as the trial court feared, the prosecutor had available other tools to secure the witness's participation, such as offering immunity or compelling the witness to appear by subpoena. See MCL 767.19a; MCL 767.19b; MCL 767.21. Further, to the extent that grand jury materials are admitted at trial or in lower court filings, the Free Press and the public will have access to them. Therefore, the grand jury inquiry did not justify entry of the gag order.

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[6] Note that disclosure of grand jury testimony under MCL 767.19g(2) is limited to the testimony of witnesses who will testify at trial; *Bellanca* contains no such limitation, and in fact, indicates that a defendant "must have access to the transcripts of the testimony of all witnesses for or against him given before the 'one-man grand juror' in order to be accorded due process." *Bellanca*, 386 Mich at 712.

Additionally, there is no basis for the trial court's finding that pretrial publicity would likely deny defendants a fair trial. First, the trial court failed to consider evidence on this issue and failed to explain the factual basis for the gag order when the gag order was issued. The mere fact that there was pretrial publicity does not inevitably lead to the conclusion that there would be an unfair trial. See *Nebraska Press*, 427 US at 554. Instead, the trial court's decision was premised on the trial judge's "belief" that the pretrial publicity in this case would deny defendants a fair trial. Second, the trial court failed to discuss the interests served by the gag order, and the court failed to weigh the need to deter publicity that could threaten defendants' Sixth Amendment right to a fair trial against the First Amendment rights of the media and public to access information. "Each right is crucial to the maintenance of a free society. Without freedom of the press a free society will not long endure. A free press is particularly important when public officials face criminal charges relating to their use of office." *Dow Jones*, 842 F2d at 609. This is especially true in this case, considering the public interest in the Wayne County Jail Project and the apparent waste of millions of dollars of taxpayer money. The trial court failed to consider the interests involved and whether the possible prejudice to defendants' right to a fair trial justified the prior restraint. See *id*. at 609-610.

In addition, the court was required to "explore whether other available remedies would effectively mitigate the prejudicial [pretrial] publicity." *Dow Jones*, 842 F2d at 611. Alternative measures to ensure the fairness of trial include a change of venue, postponement of trial, a focus on the issue during voir dire, special jury instructions, or jury sequestration. *Id*. The trial court failed to consider any of these measures as

alternatives to the gag order. See *id*.; *CBS*, 522 F2d at 238 (noting that a prior restraint "cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms").

Finally, the trial court entered the gag order sua sponte. During the hearing on the motion to vacate the gag order, counsel for defendant Collins remarked that the trial court was likely attempting to protect his client's rights by entering the gag order, but refrained from asking the trial court to enforce the order. Counsel for defendant Sledge also conceded that he could not disagree with the Free Press's argument that the Michigan Rules of Professional Conduct already acted as an appropriate control on any statements by a party's counsel. Significantly, neither defendants nor the prosecutor originally believed such an order was necessary, and during the hearing, neither requested that the court uphold the gag order. Ultimately, the trial court lacked awareness of the issues and did not properly apply the law. Because the trial court completely failed to support the gag order with findings of fact or conclusions of law, the gag order fails to overcome the heavy presumption of unconstitutionality.

Even assuming that the gag order did not constitute a prior restraint, the trial court was nevertheless required to justify the order. See *Dow Jones*, 842 F2d at 609. When Sixth Amendment rights are at issue, "the standard by which to measure justification [for a gag order] is whether there is a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial." *Id*. at 610 (citation omitted). A gag order must be reasonable and serve a legitimate purpose. See *Radio & Television News Ass'n of Southern California v United States Dist Court for the Central Dist of California*, 781 F2d 1443, 1447-1448 (CA 9, 1986). The trial court

failed to make findings of fact or conclusions of law indicating a "reasonable likelihood" that defendants' right to a fair trial would be prejudiced. See *Dow Jones*, 842 F2d at 609. Furthermore, the overbroad scope of the gag order was not reasonable for the reasons discussed above. See *Radio & Television News Ass'n*, 781 F2d at 1447-1448. Therefore, the gag order fails to meet even the lower standard that is applied when there is no prior restraint. See *id*.

III. CONCLUSION

The trial court issued a gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public. The overbroad and vague gag order constituted a prior restraint on freedom of speech, freedom of expression, and freedom of the press, and the trial court failed to justify the gag order. Accordingly, we reverse the trial court's denial of the Free Press's motion to vacate the gag order, and we vacate the gag order. We do not retain jurisdiction.

GADOLA, P.J., and BECKERING, J., concurred with JANSEN, J.

PEOPLE v COMER

Docket No. 318854. Submitted October 1, 2015, at Detroit. Decided October 8, 2015, at 9:00 a.m. Leave to appeal sought.

Justin T. Comer pleaded guilty to charges of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(3), in the St. Clair Circuit Court. The court, James Adair, J., sentenced defendant to 51 months to 18 years in prison for the CSC-I conviction. Defendant sought leave to appeal. In lieu of granting leave to appeal, the Court of Appeals vacated defendant's CSC-I sentence and remanded for resentencing. On remand, the court resentenced defendant to a minimum of 42 months in prison for the CSC-I conviction. The Michigan Department of Corrections notified the circuit court that defendant's sentence should have included lifetime electronic monitoring. The court, Michael West, J., held a hearing on the question and ruled, over objection, that defendant's plea was defective. The circuit court offered defendant the chance to withdraw his guilty plea or allow it to stand while acknowledging that his plea carried with it lifetime electronic monitoring. Defendant declined to withdraw his plea, and the circuit court entered a new judgment of sentence maintaining the term of incarceration previously imposed and adding a requirement of lifetime electronic monitoring upon defendant's release from prison. Defendant again sought leave to appeal. The Court of Appeals denied defendant's delayed application, but the Supreme Court remanded the case for consideration as on leave granted. 497 Mich 957 (2015).

The Court of Appeals *held*:

MCL 750.520b(2)(d) states that in addition to other penalties, the court shall sentence a defendant convicted of CSC-I to lifetime electronic monitoring under MCL 750.520n. In *People v Brantley*, 296 Mich App 546 (2012), the Court of Appeals held that while the language of MCL 750.520n(1) indicates that a trial court must order a defendant who is convicted of CSC-I to submit to lifetime electronic monitoring only if the defendant was 17 years old or older and the victim was less than 13 years old, examining the statutory language in context, defendants convicted of CSC-I are

subject to lifetime monitoring regardless of the age of the defendant or the victim. Therefore, defendant was subject to lifetime electronic monitoring, and lifetime electronic monitoring should have been imposed as part of defendant's sentence. Because defendant's sentence did not include lifetime electronic monitoring, the sentence was invalid. MCR 6.429 states that the court may correct an invalid sentence. In *People v Harris*, 224 Mich App 597 (1997), the Court of Appeals held that a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A) and that the court rule does not set time limits with respect to a trial court's authority to correct an invalid sentence. In this case, the Court of Appeals was bound by *Harris*. The trial court, accordingly, was empowered to correct defendant's invalid sentence.

Affirmed.

GLEICHER, P.J., concurring, agreed with the result reached by the majority because she was compelled to do so by the decision in *Harris*, but in her view *Harris* was wrongly decided and should be overruled. MCR 6.429(A) establishes that a trial court has the authority to correct an invalid sentence. MCR 6.429(B) sets forth various time limits for filing a motion to correct an invalid sentence. These procedures clearly contemplate that a court may correct an invalid sentence only after a party has filed a motion seeking that relief. No motion was filed in this case. Notices sent by the Department of Corrections are merely advisory and do not excuse compliance with the relevant statutes and court rules. Under MCR 6.435(B), if a sentencing error is substantive, a court may only modify the sentence if it has not yet entered judgment in the case. In this case, the error was substantive. Because judgment was entered, the trial court lacked authority to correct the mistake. Further, the court abused its discretion by attempting to circumvent MCR 6.435 by withdrawing defendant's guilty plea and forcing him to enter a renewed plea of guilty. Under MCR 6.310(C), a defendant may move to withdraw his or her guilty plea within six months after sentence, and thereafter only in accordance with the procedure set forth in MCR 6.500 *et seq*. That did not happen in this case. The prosecution cited no authority empowering the trial court to independently decide, years after sentencing, that a defect in a plea proceeding allowed it to set aside the guilty plea. The Court of Appeals failed to address the implications of MCR 6.435 in *Harris*, and were it not for *Harris*, Judge GLEICHER would have vacated the electronic monitoring provision in defendant's sentence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Assistant Prosecuting Attorney, for the people.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for defendant.

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

PER CURIAM. Defendant pleaded guilty to first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(3). This Court vacated his original sentences for reasons not germane to this appeal, and new sentences were imposed. Neither the first nor the second CSC-I sentence included a provision for lifetime electronic monitoring as required under MCL 750.520b(2)(d).[1] Three and a half months after defendant was resentenced, the Department of Corrections notified the trial court that the judgment of sentence omitted "any specific language ordering lifetime electronic monitoring . . . ." Over defendant's objection, the trial court resentenced him a third time and imposed lifetime electronic monitoring.

Defendant asserts that he is not subject to lifetime electronic monitoring and that the trial court waited too long before imposing that punishment. Binding caselaw requires us to reject both arguments. Accordingly, we affirm.

I

In 2011, former St. Clair Circuit Court Judge James Adair sentenced defendant to 51 months' to 18 years'

[1] This provision required the court to sentence defendant to lifetime electronic monitoring under MCL 750.520n.

imprisonment for the CSC-I conviction. The judgment of sentence form included a line to be checked by the trial court indicating, "The defendant is subject to lifetime monitoring under MCL 750.520n." Judge Adair did not place a checkmark on this line or otherwise indicate in the judgment of sentence that defendant was subject to lifetime electronic monitoring.

Defendant sought leave to appeal his sentence, contending that the trial court had improperly scored several offense variables. In lieu of granting leave to appeal, we vacated defendant's CSC-I sentence and remanded for resentencing. *People v Comer*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 309402). On October 8, 2012, Judge Adair resentenced defendant, lowering his minimum sentence for both convictions to 42 months' imprisonment. The second judgment of sentence form includes the same unchecked line referring to lifetime monitoring and omits any other reference to that punishment.

On January 29, 2013, the Michigan Department of Corrections notified Judge Adair that pursuant to *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), defendant's sentence should have included lifetime electronic monitoring. Defendant's previous appellate counsel, Jacqueline Ouvry, filed an objection, arguing that *Brantley* did not apply to defendant and that because the prosecution neglected to bring a motion to correct defendant's sentence, MCR 6.429(B)(3) precluded resentencing. Ms. Ouvrey further contended that the Supreme Court's opinions in *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012), and *People v Lee*, 489 Mich 289; 803 NW2d 165 (2011), prohibited the court from amending defendant's sentence to add a provision for lifetime electronic monitor-

ing. The prosecution replied that *Brantley* applied, and that without a provision for lifetime electronic monitoring, defendant's sentence was invalid. The prosecution insisted that the court had the authority to correct defendant's sentence by offering him the opportunity to withdraw his previous guilty plea or allowing that plea to stand after being informed of the lifetime electronic monitoring requirement.

At a hearing conducted on April 29, 2013, Judge Michael West, Judge Adair's successor, found defendant's guilty plea "defective," declaring: "I'm not going to proceed further with the plea being defective." Ms. Ouvrey contended that omission of lifetime electronic monitoring constituted a "substantive mistake" that could be corrected only pursuant to a timely motion to correct an invalid sentence, which the prosecution had failed to file. The court rejected this argument, reasoning: "This is not a question of whether the sentence is invalid. This is a question as to whether the plea was invalid." Judge West then offered defendant the opportunity to withdraw his guilty plea or to allow the plea to stand while acknowledging that the plea "carries with it . . . lifetime electronic monitoring." Defendant declined to withdraw his plea. Judge West signed a new judgment of sentence maintaining the term of incarceration previously imposed and adding, "Lifetime GPS upon release from prison." (Capitalization altered.)

Defendant again sought appellate review of his sentence, and the trial court appointed different counsel. This Court denied defendant's delayed application for leave to appeal. *People v Comer*, unpublished order of the Court of Appeals, entered January 27, 2014 (Docket No. 318854). The Supreme Court remanded for consideration as on leave granted. *People v Comer*, 497 Mich 957 (2015).

II

Defendant first contends that *Brantley* "did not create a mandate to amend the Judgment of Sentence in every CSC-I case issued since 2006, where lifetime electronic monitoring was not applied." While we agree that no such "mandate" exists, we reject defendant's related argument that the law remains "not settled" regarding whether defendants convicted of CSC-I are subject to lifetime electronic monitoring. In *Brantley*, this Court considered the statutory circumstances under which a defendant convicted of CSC-I must submit to lifetime electronic monitoring. The defendant in that case contended that lifetime electronic monitoring could be imposed only if the defendant was 17 years old or older and the victim was less than 13 years old at the time of the offense. *Brantley*, 296 Mich at 556. The majority conceded that "the language of MCL 750.520n(1) does seem to indicate that a trial court must order a defendant who is convicted of CSC-I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older, and the victim was less than 13 years old." *Id*. at 557. Over a strong dissent by Judge K. F. KELLY, the majority nevertheless determined that "in context" and pursuant to a tool of statutory interpretation known as the last-antecedent rule, defendants convicted of CSC-I under MCL 750.520b(1)(c) are subject to lifetime monitoring under MCL 750.520b(2)(d), regardless of the age of the defendant or the victim. *Id*. at 557-559.

In *People v King*, 297 Mich App 465, 487; 824 NW2d 258 (2012), the majority criticized *Brantley*'s reasoning and called for a conflict panel to resolve which defendants convicted of CSC-I are subject to lifetime electronic monitoring. This Court declined to convene a conflict panel, *People v King*, 297 Mich App 802 (2012),

and the Supreme Court denied the defendant's application for leave to appeal. *People v King*, 493 Mich 938 (2013). More recently, in *People v Johnson*, 298 Mich App 128, 135-136; 826 NW2d 170 (2012), we reiterated that MCL 750.520b(2) "requires lifetime electronic monitoring for first-degree criminal sexual conduct convictions when the defendant has not been sentenced to life in prison without the possibility of parole." We are required to follow *Brantley* and *Johnson*, MCR 7.215(J)(1), and conclude that the law is now settled: defendant was subject to lifetime electronic monitoring when he was first sentenced in 2011.

In *Cole*, 491 Mich at 327, 336, the Supreme Court held that when enacting MCL 750.520n(1), the Legislature intended to make lifetime electronic monitoring part of the sentence itself for CSC-I. Accordingly, because defendant's sentence did not include electronic monitoring, it was properly considered invalid by the trial court.

III

We next consider whether the trial court possessed the authority to correct defendant's sentence 20 months after the original sentencing.[2] Our resolution of this issue hinges on our interpretation of several rules of criminal procedure. We interpret and apply these rules de novo. *Lee*, 489 Mich at 295. In doing so, we are guided by the general rules of statutory interpretation. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Foremost among those rules is that we must give effect to the intent and purpose underlying them. *Brown v Gainey Transp Servs, Inc*,

[2] Defendant's 4½-page brief on appeal only tangentially raises this issue, but we consider it nonetheless as defendant raised this issue more fully in a reply brief filed *in propria persona* in the Supreme Court.

256 Mich App 380, 383; 663 NW2d 519 (2003). Because both judgments of sentence violated the law by omitting a provision for lifetime monitoring, we train our attention on the rules governing correction of invalid sentences.

MCR 6.429 is titled "Correction and Appeal of Sentence." Subrule (A) concerns a court's "Authority to Modify" a sentence. It provides that either party may move "to correct an invalid sentence . . . ." The rule continues, "The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."

In *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997), this Court held that "a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A)," and that the court rule "does not set time limits with respect to a trial court's authority to correct an invalid sentence." Further, *Harris* broadly declares, "There being no time restrictions specified in MCR 6.429(A), we decline to construe this court rule as containing a jurisdictional time limitation. Therefore, there was no impediment to the time of the trial court's decision . . . that would preclude it from ordering a resentencing pursuant to MCR 6.429(A)." *Id*. We are bound by *Harris*. MCR 7.215(J)(1). Accordingly, the trial court was empowered to correct defendant's invalid sentence without time limitation.

We affirm.

GLEICHER, P.J., and SAWYER and MURPHY, JJ., concurred.

GLEICHER, P.J. (*concurring*). I concur with the result reached in the majority opinion only because I am

compelled to do so by *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997). In my view, *Harris* was wrongly decided and should be overruled by our Supreme Court. Further, I believe that the Supreme Court has signaled, albeit in obiter dictum, that the analysis set forth in *Harris* is deeply flawed. Were it not for *Harris*, I would vacate the electronic monitoring provision from defendant's sentence.

Resolution of this case hinges on an interpretation of two closely related court rules. The first, MCR 6.429 sets forth two relevant subrules. Subrule (A) establishes that a trial court possesses the authority to correct an invalid sentence. Subrule (B), titled "Time for Filing Motion," sets forth various time limits for filing a motion to correct an invalid sentence. Subrule (B)(1) provides that "[a] motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal." If a claim of appeal has already been filed, a motion to correct an invalid sentence may be filed only in accordance with the procedure set forth in MCR 7.208(B), or the remand procedure set forth in MCR 7.211(C)(1).[1] MCR 6.429(B)(2). If the matter involves a defendant who may only appeal by leave (as here), a motion to correct an invalid sentence must be filed "within 6 months of entry of the judgment of conviction and sentence." MCR 6.429(B)(3). When a defendant is no longer entitled to appeal by leave, "the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500." MCR 6.429(B)(4).

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[1] MCR 7.208(B)(1) provides that "[n]o later than 56 days after the commencement of the time for filing the defendant-appellant's brief" in the Court of Appeals, the defendant may file in the trial court a motion to correct an invalid sentence. MCR 7.211(C)(1) addresses motions to remand filed in the Court of Appeals "[w]ithin the time provided for filing the appellant's brief . . . ." Neither rule applies here.

These procedures clearly contemplate that a court may correct an invalid sentence only after a party has filed a motion seeking that relief. Although MCR 6.429(A) imbues a court with the *authority* to correct an invalid sentence, MCR 6.429(B) describes in considerable detail the *process* for correcting an invalid sentence. That process commences with the filing of a motion. Justice STEPHEN MARKMAN reached the same conclusion when dissenting from an order denying leave to appeal in *People v Peck*, 481 Mich 863, 867 (2008) (MARKMAN, J., dissenting). Joined by Justice CAVANAGH, Justice MARKMAN wrote that MCR 6.429 "requires that a 'motion' be 'filed' by a 'party' before a trial court may correct a sentence." *Id*. at 867 n 1. No motion was filed in the case at bar.

Furthermore, I believe that the Supreme Court's opinion in *People v Holder*, 483 Mich 168; 767 NW2d 423 (2009), comes close to implicitly overruling *Harris*. The defendant in *Holder* committed several crimes after receiving a parole discharge from prison. *Id*. at 169. The trial court sentenced him for those crimes. Subsequently, the Department of Corrections (DOC) notified the defendant and the trial court that it had "cancelled" the defendant's parole discharge. The DOC asked the judge "to amend defendant's judgment of sentence to reflect that the sentence imposed was to be served consecutively to the sentence for which defendant was on parole." *Id*. at 170. The judge complied with this request. *Id*. The Supreme Court held that "[b]ecause the original judgment of sentence was valid when imposed, the sentencing judge had no authority to modify it pursuant to MCR 6.429(A)," and vacated the amended sentence. *Id*. The Supreme Court emphasized that notices sent by the DOC to trial courts "are merely advisory and informational in nature," and do

not excuse compliance with "the relevant statutes and court rules." *Id*.

Holder is distinguishable from this case, as the sentence in *Holder* was valid when imposed while defendant's sentence was not. However, in obiter dictum the *Holder* Court observed:

> While the DOC certainly has an obligation to ensure that any sentence executed is free from errors, the department is not a party to the underlying criminal proceedings under either MCR 6.429 or MCR 6.435. As a result, we wish to reiterate that *any* notices sent from the DOC to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein merely advisory. Any judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC. It is imperative, however, that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules. *Significantly, if the claimed error is substantive, the court may modify the sentence only "[a]fter giving the parties an opportunity to be heard" and if "it has not yet entered judgment in the case. . . ." MCR 6.435(B).* Similarly, if the original judgment of sentence was valid when entered, MCR 6.429(A) controls and mandates that the court "may not modify a valid sentence after it has been imposed except as provided by law." [*Id*. at 176-177 (emphasis altered; bracketed alteration in original).]

Here, as in *Holder*, a letter from the DOC triggered the trial court's correction of defendant's sentence. Here, as in *Holder*, the error was substantive rather than clerical. I conclude, as the Supreme Court indicated in *Holder*, that the procedure for correcting a substantive error is governed by MCR 6.435(B).

MCR 6.435 empowers courts to correct "mistakes." This court rule distinguishes between two types of mistakes—"clerical" and "substantive"—as follows:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, *and provided it has not yet entered judgment in the case*, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. [Emphasis added.]

Because the omission of lifetime electronic monitoring from both judgments of sentence constituted a substantive rather than a clerical mistake, were it not for *Harris*, I would hold that the trial court lacked the authority to correct this mistake.

According to the 1989 Staff Comment to MCR 6.435, Subrule (A) permits a court to correct "an inadvertent error or omission in the record, or in an order or judgment." The purpose of Subrule (A) "is to make the lower court record and judgment accurately reflect what was done and decided at the trial level." *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998) (discussing MCR 2.612(A)(1), which is identical to MCR 6.435(A)) (citation and quotation marks omitted).

The staff comment explains that Subrule (B), addressing "substantive mistakes," "pertains to mistakes relating not to the accuracy of the record, but rather, to the correctness of the conclusions and decisions reflected in the record." The comment continues, "Substantive mistake refers to a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law." MCR 6.435, 1989 Staff Comment. The comment provides the following examples intended to "illustrate the distinction" between clerical and substantive mistakes:

> A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subrule (A). A prison sentence entered on a judgment that is erroneous because the judge relied on mistaken facts (for example, confused codefendants) or made a mistake of law (for example, unintentionally imposed a sentence in violation of the *Tanner* rule[2]) is a substantive mistake and is correctable by the judge under subrule (B) until the judge signs the judgment, but not afterwards. [*Id*.]

During defendant's first two sentencing hearings, neither Judge Adair nor the prosecuting attorney mentioned lifetime electronic monitoring. Most likely, this was because it remained unclear whether lifetime electronic monitoring was required when a defendant's CSC-I offense did not involve a child under the age of 13. *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), and *People v King*, 297 Mich App 465; 824 NW2d 258 (2012), illustrate the disagreement over this legal question. In my view, Judge Adair (and the prosecutor) neglected to raise the issue of lifetime monitoring because both were "laboring under a misconception of the law . . . ." See *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981). Their misconception gave rise to a substantive mistake requiring correction. Under MCR 6.435(B), that correction could only occur before the court entered a judgment of sentence.

Notably, in *Harris*, this Court failed to address MCR 6.435. I believe that properly construed, MCR 6.435 governs the procedure for correcting mistakes that render a sentence invalid. Although MCR 6.429 em-

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[2] The "*Tanner* rule" refers to the prelegislative-sentencing-guidelines rule that a defendant's minimum sentence could be no more than 2/3 of his or her maximum sentence. See *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).

powers a trial court to make corrections, MCR 6.435 imposes limits on that authority. Because the correction of substantive mistakes must occur before entry of the judgment of sentence, I believe that Judge West was foreclosed from adding lifetime electronic monitoring as a term of defendant's sentence.

Finally, I believe that Judge West erred by attempting to circumvent MCR 6.435 by withdrawing defendant's guilty plea and forcing him to enter a renewed plea of guilty. A defendant may move to withdraw his guilty plea within six months after sentence is imposed, and thereafter only in accordance with the procedure set forth in MCR 6.500 *et seq*. MCR 6.310(C). Defendant did not move to withdraw his guilty plea within six months, and never invoked the procedures set forth in MCR 6.500 *et seq*. MCR 6.310(C) further provides:

> If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.

In context, this provision of MCR 6.310(C) relates to the trial court's determination of a *motion* brought by a defendant to withdraw a guilty plea. MCR 6.310(E) allows a court to vacate a plea on a prosecutor's motion "if the defendant has failed to comply with the terms of a plea agreement." I have located no authority empowering a trial court to independently decide, years after sentencing, that a defect in the plea proceeding required setting aside a guilty plea. Moreover, in *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995), this Court emphasized that a "trial court may exercise its discretion to vacate an accepted plea only

under the parameters of the court rule." Therefore, in my view the trial court abused its discretion by withdrawing defendant's guilty plea and requiring him to re-plead, and this defective procedure did not restart the clock under MCR 6.435(B).

Harris permits a trial court to substantively modify a defendant's sentence without a motion, and at any time. I believe that MCR 6.435 was intended to rein in a court's authority to alter even an invalid sentence, and urge the Supreme Court to consider this question.

In re MARDIGIAN ESTATE

Docket No. 319023. Submitted March 11, 2015, at Lansing. Decided October 8, 2015, at 9:05 a.m. Leave to appeal sought.

Melissa Goldberg, Susan Lucken, and others challenged the will and trust of the decedent, Robert D. Mardigian, in the Charlevoix County Probate Court. They claimed that attorney Mark S. Papazian, the proponent of the documents and the recipient, together with his children, of the majority of the decedent's estate, had drafted the documents in violation of the Michigan Rules of Professional Conduct (MRPC). The will challengers moved for partial summary disposition, contending that the devises to Papazian and his family were void and unenforceable because of the violation of public policy. The court, Frederick R. Mulhauser, J., granted partial summary disposition in favor of the challengers. Papazian appealed. While Papazian's appeal was pending, the probate court denied his request for a stay of further proceedings. The remaining parties reached a settlement contingent on the outcome of Papazian's appeal.

The Court of Appeals *held*:

1. *In re Powers Estate*, 375 Mich 150 (1965), held that a will, devising the bulk of the estate to a member of the family of the attorney who drafted the will, and also naming the attorney as an additional beneficiary, was not necessarily invalid. Rather, in such circumstances, a question of undue influence exists, such that undue influence arising from the relationship is presumed to have been exerted as the means to secure the testamentary gift. *Powers* controlled the outcome in this case, requiring a remand for further proceedings in which Papazian would be required to overcome the presumption of undue influence arising from the attorney-client relationship in order for the devises left to him and his family to be enforced. *In re Karabatian's Estate*, 17 Mich App 541 (1969), which reached a contrary conclusion, erred by failing to follow *Powers* and was not binding.

2. With regard to the policy implications of this case, MRPC 1.8(c) states that a lawyer generally may not prepare an instrument giving the lawyer, or certain persons related to the lawyer, any substantial gift from a client, including a testamen-

tary gift. The rules of professional conduct may, but do not necessarily, constitute definitive indicators of public policy. Therefore, while a violation of MRPC 1.8(c) is unethical conduct, it is not necessarily conduct against public policy. And while contracts entered into in violation of the MRPC have been found unenforceable, trusts and wills are not contracts and implicate different policy considerations. Accordingly, there may be valid policy reasons for a court to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. The Legislature's statutory scheme also suggests that the contestant of a will or trust must establish, *inter alia*, undue influence in order to invalidate the trust or will. Because Papazian was the decedent's fiduciary, because he benefited from the transaction with the decedent, and because, as the drafter of the documents, he had an opportunity to influence the decedent's decision in that transaction, it is presumed he exerted undue influence in securing the devises at issue. However, caselaw and existing statutes afford Papazian the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside, and that in fact the devises represent the unfettered and uninfluenced intent of the decedent.

Reversed and remanded for further proceedings.

SERVITTO, J., dissenting, disagreed with the majority's conclusion that *Powers* required remand for further proceedings, and instead would have affirmed the probate court's determination that the devises to Papazian and his children were void as against public policy. *Powers* was decided long before the Supreme Court adopted the MRPC. Those rules now specifically prohibit Papazian's conduct. Michigan courts have since held that contracts are unethical when drafted in violation of the MRPC, and that unethical contracts violate public policy and are unenforceable. Given the analysis in those decisions and the adoption of the rules governing attorney conduct, the holding in *Powers* was superseded by subsequent Supreme Court actions.

WILLS — TRUSTS — DEVISES TO THE DRAFTER — PRESUMPTION OF UNDUE INFLUENCE.

A will or trust devising the bulk of the estate to the attorney who drafted the document, or the attorney's family, is not necessarily invalid; rather, a question of undue influence exists, such that undue influence arising from the relationship is presumed to have been exerted as the means to secure the testamentary gift;

> in order to enforce the devise, the attorney must overcome the presumption of undue influence arising from the attorney-client relationship.

Young & Associates, PC (by *Roger D. Young* and *J. David Garcia*), for Mark Papazian.

Ahern & Kill, PC (by *Joseph A. Ahern*, *Amanda A. Kill*, and *Carey L. Sienkiewicz*), for Melissa Goldberg.

Bendure & Thomas (by *Marc E. Thomas* and *Benjamin I. Shipper*) for Susan Lucken and Nancy Varbedian.

Miller, Canfield, Paddock and Stone, PLC (by *Gerald J. Gleeson, II*, *Paul D. Hudson*, and *Dawn M. Schluter*), for Edward, Grant, and Matthew Mardigian.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

WILDER, P.J. In this action originating in the Charlevoix County Probate Court, appellees contested the August 13, 2010 trust and the June 8, 2011 will of decedent Robert D. Mardigian (decedent). Appellees challenged the trust and will on the basis that appellant, the proponent of the documents and the recipient, together with his children, of the majority of decedent's estate, also was the drafter of the documents in violation of the Michigan Rules of Professional Conduct (MRPC). In a motion for summary disposition filed in the probate court under MCR 2.116(C)(10), appellees contended that the devises were void as against public policy and, therefore, unenforceable. The probate court granted the motion for summary disposition, and this appeal ensued. For the reasons articulated herein, we reverse.

I. STATEMENT OF FACTS

On August 13, 2010, decedent executed an amended

trust prepared by appellant,[1] decedent's longtime-friend and an attorney, which left the bulk of decedent's estate to appellant and his children, Todd Papazian and Tyler Papazian. Decedent also executed a will prepared by appellant on June 8, 2011, that contained similar provisions. Decedent died on January 12, 2012.

After decedent's death, appellant sought to introduce the documents he had prepared for probate, along with a petition to be appointed personal representative pursuant to the language in the document. Appellees Edward Mardigian, Grant Mardigian, and Matthew Mardigian, decedent's brother and nephews, respectively, challenged the introduction of these documents into probate, as did two of decedent's nieces, appellees Susan Lucken and Nancy Varbedian, and decedent's girlfriend, appellee Melissa Goldberg. At the same time, various appellees, primarily appellees Edward, Grant, and Matthew Mardigian, contended that subsequent writings by decedent, namely a letter with what appellant termed "dubious" handwritten notes should be submitted instead, as writings intended to be a will, and as an amendment to decedent's trust.

Following discovery, appellees Edward, Grant, and Matthew Mardigian moved for partial summary disposition and asked the probate court to void all gifts contained in both the trust and the will to appellant and his children, as a matter of law. Edward, Grant, and Matthew Mardigian argued that the gifts were against public policy, as evidenced by the MRPC, specifically MRPC 1.8(c), which provides, "A lawyer shall not prepare an instrument giving the lawyer or a

[1] Although appellees discuss appellant's initial denial of this fact in their briefs on appeal, appellant's counsel admitted that appellant prepared the documents at the motion hearing below.

person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." The probate court initially denied the motion.[2] However, after Edward, Grant, and Matthew Mardigian verbally renewed their motion during the hearing on November 6, 2013, the probate court then granted the motion on the ground that, as a matter of public policy, it could not enforce the documents.

After the probate court granted the motion for summary disposition, the matter proceeded toward a scheduled jury trial. On the date of the scheduled trial, the probate court denied appellant's motion for a stay under MCL 600.867(1); however, the probate court and other parties agreed that appellant could continue to participate in the subsequent proceedings. For reasons not clear in the record, appellant decided not to continue to participate in the proceedings. Thereafter, the other parties reached a settlement concerning the distribution of funds and the jury was excused. This Court subsequently denied appellant's motion for a stay, and denied reconsideration.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Dillard v Schlussel*, 308 Mich App 429, 444; 865 NW2d 648 (2014).

> When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to

[2] The probate court also denied appellant's motion for partial summary disposition regarding all claims of undue influence.

> judgment as a matter of law." A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. [*Id*. at 444-445 (citations omitted).]

We also review de novo the proper interpretation of trusts and wills, as well as the interpretation of statutes. *In re Stan Estate*, 301 Mich App 435, 442; 839 NW2d 498 (2013).

III. ANALYSIS

A. BINDING SUPREME COURT PRECEDENT

In *In re Powers Estate*, 375 Mich 150, 157, 176, 179; 134 NW2d 148 (1965), our Supreme Court held that a will devising the bulk of the estate to a member of the family of the attorney who drafted the will, and also naming the attorney as an additional beneficiary, was not necessarily invalid. Rather, in such circumstances, a question of undue influence exists, such that undue influence arising from the relationship is presumed to have been exerted as the means to secure the testamentary gift. *Id*. at 179. In remanding for further proceedings, the *Powers* Court stated:

> This will contest is on no different legal and factual basis than any other in our past jurisprudence and we caution court and counsel if the case is retried to confine the testimony to the issues:
>
> (1) The well-defined, well-recognized test of the testatrix' competency to execute the testamentary instrument at the time she executed it;

> (2) The equally well-defined and well-recognized issue of the exercise of fraud or undue influence in the execution thereof, including any presumption created by the fact that proponent was deceased's attorney and the fact that he drew the instrument here involved as such. [*Id*.]

In his concurrence, Justice SOURIS further noted that:

> Indeed, this Court almost 60 years ago bluntly warned the profession against such conduct, in *Abrey* v. *Duffield*, [149 Mich 248, 259; 112 NW 936 (1907)]:
>
> > By statute, a bequest to a subscribing witness, necessary for proving the will, is declared absolutely void (CL 1897, § 9268), and this, though the subscribing witness may be and generally is ignorant of the contents of the will. Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this Court has held that such dispositions are properly looked upon with suspicion. *Dudley* v. *Gates*, 124 Mich 440 [83 NW 97 (1900)]. [*Powers*, 375 Mich at 181 (SOURIS, J., concurring).]

Powers is directly on point with the facts presented in the instant case and, as such, is binding on this Court.[3] Under *Powers*, we are required to remand for further proceedings, in which appellant will be required to overcome the presumption of undue influence arising from the attorney-client relationship in order for the devises left to him and his family to be enforced.

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[3] Because "[t]he rules of construction applicable to wills also apply to the interpretation of trust documents," *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005), we conclude that *Powers* applies to both the trust and the will at issue in this case.

B. *KARABATIAN'S ESTATE* IMPROPERLY FAILED TO FOLLOW *POWERS* AND, REGARDLESS, IS NOT BINDING ON THIS COURT

Although we remand for further proceedings, we further address the significant policy questions presented by this case. First, appellees note that in *In re Karabatian's Estate*, 17 Mich App 541; 170 NW2d 166 (1969), this Court held a will to be void as against public policy under similar facts. But, we find that the *Karabatian* Court erred by failing to follow *Powers* as binding precedent, and, as a pre-1990 decision, we are not bound by *Karabatian*. MCR 7.215(J)(1); Administrative Order No. 1990-6. In addition, even if *Karabatian* may have correctly foretold the outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here, we lack the authority to overrule *Powers*:

> Although the Court of Appeals panel in this case correctly anticipated our holding, we disapprove of the manner in which the panel indicated its disagreement with [*People v Goff*, 401 Mich 412; 258 NW2d 57 (1977)]. An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts. [*People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) (citation omitted).]

C. TRUSTS AND WILLS IMPLICATE DIFFERENT PUBLIC POLICY CONSIDERATIONS THAN CONTRACTS AND THEREFORE MAY WARRANT DIFFERENT TREATMENT IN THE APPLICATION OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

Second, appellees rightly recognize that MRPC 1.8(c) expressly prohibits the conduct at issue here. Based principally on (1) the adoption of this provision, (2) the fact that our Supreme Court has ruled that "public rules of professional conduct may also constitute definitive indicators of public policy," *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002), (3)

the fact that contracts entered into in violation of the MRPC have been found unenforceable, *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189; 650 NW2d 364 (2002), and (4) the enactment by the Legislature of MCL 700.7410(1) and MCL 700.2705, appellees argue, separate and apart from the *Karabatian* decision, that the devises to appellant and his children were void as against public policy. If appellees were correct that MCL 700.7410(1) and MCL 700.2705, together with MRPC 1.8(c), make it clear that the public policy of this state prohibits an attorney or specified relative from receiving a devise from an instrument prepared by the attorney for a client, this case might be distinguishable from *Powers*. However, we conclude that appellees' argument is unavailing.

Terrien established only that "public rules of professional conduct *may* also constitute definitive indicators of public policy." *Terrien*, 467 Mich at 67 n 11 (emphasis added). Accordingly, while the violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy. Moreover, as noted in the commentary to MRPC 1.0:

> The Rules of Professional Conduct are rules of reason. . . . Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. . . .
>
> * * *
>
> . . . [A] violation of a rule does not . . . create any presumption that a legal duty has been breached. . . . The fact that a rule is a just basis . . . for sanctioning a lawyer under the administration of a disciplinary authority[] does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.

The limitations noted in the commentary to MRPC 1.0 and in *Terrien* (that a violation of the MRPC *may* constitute a definitive indicator of public policy) are important considerations in the instant case, because contracts, the legal instrument at issue in *Lizza*, are distinctly different from trusts and wills, which are at issue in this case.

A will is generally *not* a contract. 1 Williston, Contracts (4th ed), § 1:7, p 48. Wills and contracts are different in nature, most notably in that they derive their binding force from differing sources. Finburg, *Wills—As Distinguished from Common Law Contracts*, 16 BU L Rev 269, 272 (1936). Whereas a contract is "an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties," 95 CJS, Wills, § 188, p 185, a will is "a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his or her last expressed purpose, and a will, although absolute and unconditional, cannot be termed a contract," *id*. (citation omitted). It is this difference that gives rise to the separate and distinct rules applied to interpret the meaning of wills and contracts. 5 Corbin, Contracts (rev ed), § 24.1, p 6. Whereas, with most contracts, at least two participants play a role in the formation and performance, each party choosing some of the symbols of expression, and each giving those symbols a meaning that may differ materially from the meaning given to them by the other party to the contract, a will, made for the purpose of affecting the disposition of property by stating the desire of the testator, requires courts to give legal operation to the meaning of the symbols of expression of only one person—the testator. *Id*. Thus, while a court must interpret contracts in light of the intent of all of the contracting parties, in the making of

a will, the testator requires no other person's understanding or assent. *Id*. ("No one is asked to make a return promise, to render an executed consideration, or to do any other act in reliance. In contrast, these factors enter largely into the making and performance of a contract. The result is that the court must determine, in accordance with applicable contract law, which party's meaning is to prevail, a determination far less simple than in the case of a will.").

While trusts and wills "are not the same, and different legal rules govern each," 90 CJS, Trusts, § 1, p 130, under Michigan law, courts apply the same rules of interpretation to trusts and wills, *Reisman*, 266 Mich App at 527. The primary goal of interpreting wills is to give effect to the testator's intent as long as it is lawful. See *Wanstead v Fisher*, 278 Mich 68, 73; 270 NW 218 (1936) ("It is elementary that the cardinal principle in the interpretation of wills is to carry out the intention of the testator if it is lawful and can be discovered; and that the whole will is to be taken together and is to be so construed as to give effect, if it be possible, to the whole."); *Sondheim v Fechenbach*, 137 Mich 384, 387-388; 100 NW 586 (1904) ("The general rule for the interpretation of wills is that it is the duty of courts to give full and complete effect to the testator's intention, and carry out such intention if it be lawful.") (quotation marks and citation omitted). Similarly, in interpreting trusts, "the probate court's objective is to ascertain and give effect to the intent of the settlor." *Stan Estate*, 301 Mich App at 442. The devises to the appellant and his children are not, on their face, unlawful devises. Therefore, they can only be invalidated as unlawful if they are *definitively* against public policy. No statute, including MCL 700.7410(1) and MCL 700.2705, renders these devises as definitively contrary to public policy. Decedent's

purported intent, to transfer assets to appellant and appellant's children, is not per se unlawful, as demonstrated by the fact that, had an independent attorney drafted the documents rather than appellant, there was nothing illegal about the devises. Rather than the purpose of the devises being illegal, it is the fact that the person drafting the documents did so contrary to the letter and spirit of the rules of professional conduct that raises suspicion regarding the validity of the devises.[4]

In sum, there are valid policy reasons why our Supreme Court could reembrace the rule enunciated in *Powers* and conclude that it is appropriate to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, when a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual and sincere desires of the grantor. Accordingly, as noted in *Powers*, the proper remedy for the rule violation may be to follow the normal procedures intended to effectuate the grantor's intent, but to also treat the devises to the drafting attorney and his family with suspicion, through application of a presumption of undue influence, rather than to declare the devises void on their face. *Powers*, 375 Mich at 179; *id*. at 180-181 (SOURIS, J., concurring). As explained in

[4] Even this Court's opinion in *Karabatian*, 17 Mich App at 546-547, which did not follow *Powers* and concluded that a bequest to a scrivener was void as contrary to public policy, nevertheless acknowledged that there was no statute to invalidate a bequest to a scrivener.

Part III(D) of this opinion, if appellant can rebut the presumption of undue influence with competent evidence, then the devises should be enforced.

D. THE PRESUMPTION OF UNDUE INFLUENCE MUST BE REBUTTED BY APPELLANT TO AVOID INVALIDATION OF THE DEVISES

Finally, the statutory scheme provided by the Legislature suggests that the contestant of a trust or will must establish, *inter alia*, undue influence in order to invalidate the trust or will. MCL 700.2501 provides as follows:

> (1) An individual 18 years of age or older who has sufficient mental capacity may make a will.
>
> (2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:
>
> (a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
>
> (b) The individual has the ability to know the nature and extent of his or her property.
>
> (c) The individual knows the natural objects of his or her bounty.
>
> (d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

The right to contest a will is statutory and "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." MCL 700.3407(1)(c). That is, the testator's capacity to make a will is presumed. See also *In re Skoog Estate*, 373 Mich 27, 30; 127 NW2d 888 (1964). And whether a testator had the requisite testamentary capacity "is judged as of the time of the execution of the instrument, and not before or after, except as the condition

before or after is competently related to the time of execution." *Powers*, 375 Mich at 158. Similarly, a trust is created only if the settlor has capacity to create a trust and the settlor indicates an intention to create the trust. MCL 700.7402(1)(a) and (b). "A trust is void to the extent its creation was induced by fraud, duress, or undue influence." MCL 700.7406.

"To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003) (quotation marks and citation omitted). Motive, opportunity, or the ability to control, without proof that it was exercised, are insufficient to establish undue influence. *Id*. (citation omitted). However, as previously discussed, in certain circumstances, undue influence is presumed:

> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).]

As this Court has further explained:

> The establishment of this presumption creates a "mandatory inference" of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the

> burden of persuasion. [*In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985) (citation omitted).]

The framework adopted by our Legislature attempts both to honor the actual intent of the grantor and protect against abuse. Because appellant was decedent's fiduciary, because he benefited from the transaction with decedent, and because, as the drafter of the documents, he had an opportunity to influence decedent's decision in that transaction, it is presumed he exerted undue influence in securing the devises at issue. However, caselaw and existing statutes afford appellant the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside, and that in fact the devises represent the unfettered and uninfluenced intent of decedent.

IV. CONCLUSION

On the basis of the binding precedent of our Supreme Court in *Powers* and for the other reasons stated in this opinion, we reverse and remand to the Charlevoix County Probate Court for proceedings consistent with this opinion. As the prevailing party, appellant may tax costs under MCR 7.219.

STEPHENS, J., concurred with WILDER, P.J.

SERVITTO, J. (*dissenting*). I respectfully dissent. The majority is correct that *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), stands for the proposition that instruments drafted by an attorney that propose to give a gift or devise to the attorney or the attorney's family members may be appropriate as long as the gift or devise does not result from undue influence.

However, *Powers* was decided long before the 1988 adoption of the Michigan Rules of Professional Con-

duct (MRPC), or even the predecessor of those rules, the Code of Professional Conduct, which was adopted in 1971. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194; 650 NW2d 364 (2002). MRPC 1.8(c) now specifically prohibits this conduct. Moreover, this Court has held, in the context of a referral fee contract sought to be upheld by the attorney, a contract is unethical when it violates the MRPC, and "unethical contracts violate our public policy and therefore are unenforceable." *Lizza*, 251 Mich App at 189.

The *Lizza* Court agreed with our Supreme Court's conclusion that "[i]t would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement." *Id*. at 196 (quotation marks and citation omitted; alteration in original). While the majority correctly notes that a will is not a contract, it would nonetheless be equally absurd to allow appellant to benefit from his actions in the instant case given that he is also subject to professional discipline for those actions. And, given the analysis in *Lizza*, including the *Lizza* Court's reliance on *Abrams v Susan Feldstein, PC*, 456 Mich 867 (1997), as well as the Supreme Court's adoption of rules governing attorney conduct, this Court could conclude that the specific holding in *Powers* relied on so heavily by appellant has been superseded by subsequent Supreme Court actions.

With respect to public policy issues, our Supreme Court has stated:

> [T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. . . .

> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. [*Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002)].

The *Terrien* Court also stated, "We note that, besides constitutions, statutes, and the common law, administrative rules and regulations, and *public rules of professional conduct* may also constitute definitive indicators of public policy." *Id*. at 67 n 11 (emphasis added). In fact, our Supreme Court is charged with promulgating the rules regarding the ethical conduct of attorneys in Michigan. MCL 600.904 provides:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

It also has "the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct . . . ." *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 91; 832 NW2d 392 (2012). Because "the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904 . . . , conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy." *Id*. at 92.

I would also note that while the majority cites the presumption of undue influence with respect to trusts

and wills as a protection, the majority does not adequately address MCL 700.7410(1), governing trusts, which provides:

> In addition to the methods of termination prescribed by [MCL 700.7411 to MCL 700.7414], a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful *or contrary to public policy*. [Emphasis added.]

MCL 700.2705 similarly provides:

> The meaning and legal effect of a governing instrument other than a trust are determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in part 2 of this article, the provisions relating to exempt property and allowances described in part 4 of this article, or another public policy of this state otherwise applicable to the disposition.

Thus, once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent. Given these statutory provisions, longstanding caselaw, and the language of MRPC 1.8(c), I disagree with the majority's conclusion that *Powers* requires remand for further proceedings in which appellant would be required to overcome the presumption of undue influence. I would instead hold that the trial court did not err when it determined that the devises to appellant and his children in the June 8, 2011 will and the August 13, 2010 trust were void as against public policy and I would affirm.

WHITE v HIGHLAND PARK ELECTION COMM

Docket No. 329222. Submitted October 6, 2015, at Detroit. Decided October 8, 2015, at 9:10 a.m.

Desmond M. White sought a writ of mandamus and declaratory relief in the Wayne Circuit Court because the Highland Park Election Commission failed to appoint a Republican election inspector. The court, Robert J. Colombo, Jr., J., concluded that White did not have standing to challenge the appointment of election inspectors because the governing statute authorized only the county chair of a major political party to do so. White appealed.

The Court of Appeals *held*:

The trial court properly held that White did not have standing to challenge the appointment of election inspectors by the commission. The applicable statute, MCL 168.674(3), authorizes only the county chairs of the major political parties to challenge the commission's appointment of election inspectors. White did not have standing because she had no legal cause of action, and because she did not have a substantial interest in the statute's enforcement. In this case, the commission's failure to appoint a Republican election inspector resulted from the lack of Republican applicants for a position as an election inspector.

Affirmed.

Andrew A. Paterson for Desmond M. White.

Perkins Law Group, PLLC (by *Nikkiya T. Branch* and *Todd R. Perkins*), for defendants.

Before: MURRAY, P.J., and TALBOT and K. F. KELLY, JJ.

MURRAY, P.J. Plaintiff, Desmond M. White, appeals as of right the trial court's final order dismissing plaintiffs' verified complaint for a writ of mandamus and declaratory relief. We affirm.

In this election-related case, White challenged multiple policies and acts of defendant Highland Park Election Commission, but most of the issues raised in the complaint were resolved between the parties prior to the circuit court's rulings at issue on appeal. What was left for the circuit court to decide was whether MCL 168.674(2) required the Commission to appoint one or more Republican election inspectors. The parties agreed that, of all those who had submitted applications to the Commission to be appointed an election inspector, none had designated themselves as a Republican Party representative. Based upon that undisputed fact, and relying upon both MCL 168.674(2) and (3), the trial court held that: (1) plaintiffs lacked standing to challenge the political party composition of the election inspectors because state law gave that right to the county chairs of a major political party, and (2) in any event, the Commission did not violate MCL 168.674(2) because no Republican representatives had submitted applications to be election inspectors.

We agree with the trial court that White lacked standing to sue for a perceived violation of MCL 168.674(2). Standing exists, according to the Court in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), when there exists a legal cause of action or a plaintiff meets the requirements of MCR 2.605. *Lansing Schools Ed Ass'n* sought to return Michigan standing jurisprudence to what it was prior to *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). Prior to those decisions our Court had stated, amongst many other principles, that a plaintiff must assert her own legal rights and cannot rest her claim on the legal rights or interests of third parties. See, e.g., *In re EP*, 234 Mich App 582, 598; 595

NW2d 167 (1999), rejected on other grounds by *In re Trejo Minors*, 462 Mich 341; 612 NW2d 407 (2000).

Here, MCL 168.674(2) provides no legal cause of action, neither to White nor to any other member of the public, to enforce its provisions. Nor does White, who as to this issue is no different than all other members of the public (and she did not even allege that she was a resident of Highland Park, where the electors would have been working), have a substantial interest in seeing the statute enforced. See *Lansing Schools Ed Ass'n*, 487 Mich at 372. Indeed, the statute explicitly gives the right to enforce the political party designations to the major political party county chairs, MCL 168.674(3), which is consistent with other parts of the statute that allow those same county chairs to submit names on behalf of their parties to city election officials for use as election inspectors. See MCL 168.673a and MCL 168.674(1). As noted, the statute does not provide for a civil cause of action, but instead provides county chairs with the ability to file administrative appeals to challenge certain inspector appointments. MCL 168.674(3) and (4). In essence, the Legislature has created a form of public enforcement through an administrative appeal process, and has made that process available only to county chairs of the major political parties. White does not have standing to sue to enforce the provisions of MCL 168.674. See, e.g., *Wallad v Access Bidco Inc*, 236 Mich App 303, 308; 600 NW2d 664 (1999).

Affirmed. Defendants may tax costs, having prevailed in full. MCR 7.219(A).

TALBOT and K. F. KELLY, JJ., concurred with MURRAY, P.J.

In re DUKE ESTATE

Docket No. 321234. Submitted July 15, 2015, at Detroit. Decided October 13, 2015, at 9:00 a.m.

Crystal Clark, Charles Franklin (Frank) Duke, and Marega Delizio filed a petition in the Wayne County Probate Court to determine whether title to a 40-acre piece of property had been conveyed to the decedent's sons (Frank Duke and respondent Robert Duke) by an improperly notarized deed or whether the property remained property of the decedent's estate. The parties executed the deed and had it notarized before the decedent's death. Respondent recorded the deed approximately four months after the decedent's death. The court, Judy A. Hartsfield, J., concluded that defects in the deed's notarization invalidated the conveyance, and the court granted petitioners' petition to set aside the quitclaim deed purporting to convey the property to the decedent's sons. Respondent appealed.

The Court of Appeals *held*:

1. The probate court improperly granted petitioners' petition to set aside the quitclaim deed intended to convey the property from the decedent to his sons, because the acknowledgment of an instrument may be defective without invalidating the conveyance described in the instrument. In this case, the probate court properly held that the acknowledgment did not satisfy the statutory requirements for recording instruments related to interests in property, but the court failed to recognize that a conveyance made by a defective instrument may still be valid if the conveyance was made in good faith and for a valid consideration. An instrument must be properly acknowledged before it can be recorded, but an instrument need not be properly acknowledged to effect a valid conveyance of property. Having not received any evidence on whether the instrument was executed in good faith and for a valuable consideration, the trial court erred by summarily deciding the case in petitioners' favor.

2. The probate court properly concluded that the notary had failed to accurately note the date of the deed's execution and acknowledgment and that the affidavit filed by the notary indicating that the deed was executed at a time after the date

appearing in the instrument did not correct the errors in notarization. Any instrument may be invalidated for a violation of the acknowledgment requirements. In this case, the deed itself contained a date different from the date the instrument was allegedly executed, and the notary's affidavit explaining the discrepancy was insufficient to correct the defect.

3. An affidavit recorded under MCL 565.202 does not allow for the broad correction of errors in a recorded document. The saving affidavit authorized by MCL 565.202 applies only to errors or discrepancies in a person's name.

Reversed and remanded.

PROPERTY — CONVEYANCE OF INTEREST IN PROPERTY — ERROR IN ACKNOWLEDGMENT — SAVING AFFIDAVIT.

The saving affidavit required by MCL 565.202 is limited to the correction of errors or discrepancies in the name of a person on a recorded instrument; the saving affidavit cannot cure other errors in the acknowledgment or notarization of the instrument.

Julia Blakeslee for petitioners.

Anthony J. Garczynski, PLC (by *Anthony J. Garczynski*), for respondent.

Before: WILDER, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

WILDER, P.J. Respondent Robert Duke appeals as of right a probate court order granting the petition filed by petitioners Crystal Clark, Charles Franklin Duke (Frank), and Marega Delizio, to determine title to real estate located in Huron Township, Michigan, and to set aside the quitclaim deed that allegedly conveyed the property at issue in this case. We reverse and remand for further proceedings consistent with this opinion.

I

Before his death, decedent Charles E. Duke (decedent) executed a quitclaim deed that conveyed approximately 40 acres of land on Inkster Road in Huron

Township, Michigan (Inkster Road property), to his sons, Frank and respondent. According to the notations on the document, the deed was acknowledged by decedent, petitioner Frank, and respondent on May 14, 2007, before "EA Labadie," a notary public whose commission was to expire on December 30, 2014. On September 23, 2009, decedent passed away. In January 2010, respondent recorded the quitclaim deed with the Wayne County Register of Deeds. On April 28, 2010, respondent was appointed personal representative of decedent's estate. When respondent filed his initial inventory of the estate on September 7, 2011, he did not include the Inkster Road Property.[1]

On January 9, 2014, petitioners filed a petition to determine title to the Inkster Road property and to set aside the quitclaim deed, arguing that the Inkster Road property was property of decedent's estate. Petitioners first argued that the quitclaim deed was fraudulent and void under MCL 565.46 and MCL 565.47 because it was improperly notarized and, as a result, could not be validly recorded as a conveyance of real estate under MCL 565.201(1)(c). Petitioners contended that the alleged notary, E. A. Labadie, was not a notary public as of May 14, 2007. Petitioners provided printouts from the Michigan Department of State website indicating that Labadie became a notary public on October 15, 2008. Next, petitioners argued that respondent procured the "notarization" of the quitclaim deed to benefit himself because Labadie was an employee of respondent. Finally, petitioners argued that there was no evidence that the deed was actually delivered, as the deed was not recorded during dece-

[1] In the meantime, a dispute arose among the parties related to respondent's purported failure to comply with reporting and inventory requirements.

dent's lifetime and, instead, was hidden away until respondent recorded the deed after decedent's death. Thus, because a court may invalidate under MCL 55.307(2) any notarial act that is not performed in compliance with the Michigan Notary Public Act, petitioners requested that the probate court order that the quitclaim deed was void, and therefore, that it did not transfer title of the Inkster Road property from decedent to respondent and Frank. Additionally, petitioners asserted that respondent "must be charged with knowledge of the falsity of the notarization of the quit-claim deed" because Labadie was respondent's employee, and because respondent authorized Labadie to use respondent's business address and phone number in her application to become a notary public in 2008.

On February 10, 2014, Labadie executed an affidavit averring that she witnessed decedent execute the quitclaim deed "on or about April 13, 2009," and that the date written and printed on the deed was incorrect. She also stated "[t]hat following execution of the deed, at the direction of [decedent], I made two copies of the deed and delivered the original to [respondent], and gave the copies to [petitioner Frank] and [decedent]."

On or about February 14, 2014, petitioners filed a brief in support of their petition. Petitioners raised the same arguments as those discussed in their initial petition and supporting brief, but they also argued, *inter alia*, that the deed constituted a gift because it was not supported by consideration. Petitioners asserted that the deed should be governed by the law applicable to gifts, not by the more lenient standards for real estate conveyances that are supported by paid consideration. Additionally, petitioners asserted that the deed was not a valid gift under Michigan law.

Finally, petitioners argued that the deed was statutorily defective and that the "savings statute," MCL 565.604, was not applicable because the statute only applies when a conveyance is "made in good faith and upon a valuable consideration." Specifically, petitioners contended that, despite the fact that Labadie was a notary public, the circumstances in which respondent arranged to have his employee sign the quitclaim deed, when no consideration was given to decedent, was evidence that the deed was executed in bad faith.

On February 26, 2014, Labadie's affidavit was recorded with the Wayne County Register of Deeds. Also on or about February 26, 2014, respondent filed a brief in response to petitioners' petition. Respondent asserted that decedent had signed a preprinted deed prepared by attorney Renee Schattler Burke in 2007. According to respondent, the deed was dated May 14, 2007, but it was actually executed on or about April 13, 2009. Additionally, respondent claimed that when the deed was signed on or about April 13, 2009, Labadie was, at that time, a notary public, the deed was signed in Labadie's presence, and Labadie erroneously conformed the date in her notary block to the date printed on the deed. Furthermore, respondent indicated "[t]hat upon realizing [that] the date on the notary block (and the deed itself) was incorrect, Ms. Labadie prepared and recorded an [a]ffidavit of correction, as allowed by MCL 565.202, correcting the date of the deed . . . and her notary block to April 13, 2009." Respondent attached a copy of the recorded affidavit to his response. Respondent also argued that the burden of proof with regard to delivery had shifted to petitioners based on the contents of Labadie's affidavit. Finally, respondent argued that the court should hold the deed valid, even if the affidavit of correction was insufficient to correct the defects in the acknowledgment, because the only

evidence presented to the court indicated that decedent intended to convey the property through the deed, and the deed was sufficient to provide notice of the conveyance. Respondent further noted that Michigan courts seek to carry out the parties' intentions, even if a deed is incomplete or ambiguous, and he provided a business letter from attorney Daniel Keith to demonstrate that decedent had intended to transfer the property to respondent and petitioner Frank as early as 2001.

On March 5, 2014, the probate court held a hearing on the petition, and the parties presented arguments consistent with those raised in their briefs. In addition, petitioners contested respondent's claim that petitioner Frank was present when the deed was purportedly executed in April 2009, indicating that petitioner Frank was present and willing to testify that he was not present when the deed was executed. Although the court did not ask him to testify, petitioner Frank—who was sworn as a witness at the beginning of the hearing but was never examined by petitioners' or respondent's counsel—briefly confirmed on the record that he was not present in April 2009. Regarding recordation under MCL 565.46, respondent argued that there is a difference between executing a valid conveyance and making a deed eligible for recording, arguing that there is no dispute that a valid conveyance occurred in the instant case. The probate court stated that an affidavit filed by the attorney who prepared the deed (Burke) was not "particularly persuasive" or "clear and convincing" as to the date on which the deed was actually executed, and that it did not believe that Labadie notarized the deed in April 2009. Instead, the court stated that it believed that the deed was actually executed on May 14, 2007, in light of its disbelief that a notary would sign the deed while ignoring, and

failing to correct, the numerous places on the deed that included the May 14, 2007 date. Accordingly, the probate court set aside the deed and held that the Inkster Road property was property of decedent's estate. The probate court indicated that it would issue a written order and opinion with its reasoning for the holding.

On March 17, 2014, the probate court entered an opinion and order consistent with its statements on the record. The court set aside the quitclaim deed based on its authority to invalidate a notarial act under MCL 55.307(2), noting that a deed must be acknowledged before a notary public in order to be validly recorded, and finding that the deed was not properly notarized given the uncontroverted evidence that Labadie was not a notary public on May 14, 2007. Additionally, the court indicated that it gave no credence to Burke's affidavit, and that because respondent procured her as a notary, he cannot now claim that he was unaware of Labadie's credentials. Furthermore, the court noted there was some question regarding whether the deed was properly delivered, but it declined to rule on this issue given its decision to set aside the quitclaim deed on the basis that the deed's notarization was invalid.

II

This Court reviews de novo a probate court's conclusions of law. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). Likewise, "[t]his Court reviews de novo equitable actions to quiet title." *Special Prop VI LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). When a probate court sits without a jury, this Court reviews its factual findings for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm convic-

tion that a mistake has been made, even if there is evidence to support the finding." *Id*. "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), citing MCR 2.613(C).

III

We first address respondent's argument that the trial court erred by setting aside the deed because the "only evidence submitted" indicates that the deed was properly executed—and, therefore, recordable—because it was executed on or about April 13, 2009, at which time Labadie was a notary public. In support of this argument, respondent asserts that Labadie's affidavit was adequate to correct the alleged errors in the dates of execution and acknowledgment pursuant to MCL 565.202.[2] We disagree.

MCL 565.202 provides:

> The register of deeds shall, however, receive any such instrument for record, *although the same does not comply*

[2] Respondent also argues that petitioners failed to provide any support for their suspicion related to Labadie's participation in the conveyance on the basis of her employment with respondent and in light of the fact that the address she provided to the State of Michigan in conjunction with her notary public commission was respondent's address. Because the probate court did not consider this argument, or the existence of bad faith more generally, and because we are remanding for further proceedings, we decline to review this issue in the interests of judicial economy. See *People v Trakhtenberg*, 493 Mich 38, 55 n 11; 826 NW2d 136 (2012), citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

> *with the requirements of this act*: Provided, There is recorded therewith an affidavit of some person having personal knowledge of the facts, which affidavit shall be either printed or typewritten, shall comply with the requirements of this act, and shall state therein:
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> (a) The correct name of any person, the name of whom was not printed, typewritten or stamped upon such instrument as required by this act;
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> (b) In case such instrument does not comply with the requirements of paragraph (b) of section 1, the correct name of such person and shall state that each of the names used in such instrument refer to such person. [Emphasis added.]

MCL 565.202 has only been cited in one opinion, *Cipriano v Tocco*, 757 F Supp 1484, 1491 (ED Mich, 1991), in a context that is not precisely applicable to the instant case. Thus, we determine here as a matter of first impression whether, consistent with MCL 565.202, Labadie's affidavit was sufficient to correct the purported error in the date of acknowledgment.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011), by examining the specific language of the statute, *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 795 NW2d 101 (2009). "If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). "[T]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent en-

actment as a whole." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 160; 627 NW2d 247 (2001) (quotation marks and citation omitted; alterations in original).

In reading the plain language of MCL 565.202 in context with the other sections of the Recording Requirements Act, we conclude that a "saving affidavit" under MCL 565.202 only applies to errors or discrepancies in a person's name. Clearly, the reference to "the requirements of this act" in MCL 565.202 refers to the Recording Requirements Act, MCL 565.201 *et seq*. MCL 565.201[3] sets forth the requirements for recording an instrument with the register of deeds, and MCL 565.201a delineates the requirements related to the drafter's name and business address on recorded instruments. Neither MCL 565.201 nor MCL 565.201a mentions any requirement regarding the date on which an instrument is executed or acknowledged. Instead, MCL 565.201(1) specifically requires that the name of each person purporting to execute an instrument be legibly printed, typewritten, or stamped under his or her signature, and that a discrepancy may not exist between an individual's name as printed, typewritten, or stamped under his or her signature and the individual's name as indicated in the acknowledgment or jurat. MCL 565.201a requires that "[e]ach instrument described in section 1 executed after January 1, 1964 shall contain the name of the person who drafted the instrument and the business address of such person."

Moreover, MCL 565.202 requires that an affidavit *shall* state the correct name of a person when that person's name was not printed, typewritten, or stamped on the instrument, or when there was a

[3] MCL 565.201 was amended, effective October 17, 2014. 2014 PA 347. This opinion refers to the version of MCL 565.201 that was in effect in March 2014, the time at which the probate court ruled on the petition.

discrepancy between a person's name as printed, typewritten, or stamped underneath his or her signature and the name as stated in the acknowledgment or jurat. "The word 'shall' is generally used to designate a mandatory provision . . . ." *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Thus, because an affidavit *shall* include the correct name of each person purporting to execute an instrument, it follows that an affidavit may only be recorded under MCL 565.202 to correct errors or omissions with regard to a person's name, but not other errors such as the date on which an instrument was executed or acknowledged. Compare MCL 565.202 with MCL 565.201(1) and MCL 565.201a. Therefore, contrary to respondent's argument that "MCL [] 565.202 allows for the broad correction of errors on recorded documents by subsequently recording an affidavit," we find that Labadie's affidavit was insufficient to correct the purported errors in the deed.

IV

Respondent also asserts that the probate court improperly focused on the recordability of the deed instead of whether the deed effectuated a valid conveyance, and therefore, the probate court failed to recognize that respondent's unrebutted evidence demonstrated that the property was validly conveyed through a quitclaim deed that was properly delivered. For reasons other than those argued by respondent, we remand to the probate court for further proceedings.[4]

[4] The trial court expressly declined to rule on whether proper delivery was completed in this case. We too decline to review this issue. Given that issues of fact not decided by the lower court must first be addressed, the interests of judicial economy are not well served by an initial ruling on this question by this Court. See *Trakhtenberg*, 493 Mich at 55 n 11,

The probate court accurately recognized that a deed transferring title is presumed to be valid if it is in writing, signed by the grantor, witnessed, and notarized. See MCL 565.47; MCL 565.152. The probate court also accurately recognized that improperly acknowledged deeds shall not be recorded. See MCL 565.8; MCL 565.46; MCL 565.47; MCL 565.201(1)(c).[5] Additionally, as the probate court indicated, a court is permitted to invalidate an improper notarial act pursuant to MCL 55.307(2):

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citing *Peterman*, 446 Mich at 183. On remand, the probate court is not precluded from addressing this or any other relevant issue it did not previously address.

[5] MCL 565.46 states:

> The preceding sections of this chapter to procure, enforce and obtain the proof and acknowledgment of deeds, shall be, and the same are hereby made applicable to all instruments in writing in any wise affecting the title to lands which are required or authorized to be acknowledged, or acknowledged and recorded.

MCL 565.47 provides, "A deed, mortgage, or other instrument in writing that by law is required to be acknowledged affecting the title to lands, or any interest therein, *shall not be recorded by the register of deeds* of any county unless the deed, mortgage, or other instrument is *acknowledged or proved* as provided by this chapter." (Emphasis added.) Within the chapter, MCL 565.8 provides, in relevant part:

> Deeds executed within this state of lands, or any interest in lands, *shall be acknowledged* before any judge, clerk of a court of record, or notary public within this state. The officer taking the acknowledgment shall endorse on the deed a certificate of the acknowledgment, and *the true date of taking the acknowledgment*, under his or her hand. [Emphasis added.]

Additionally, MCL 565.201(1)(c) states:

> (1) An instrument executed after October 29, 1937 by which the title to or any interest in real estate is conveyed, assigned, encumbered, or otherwise disposed of shall not be received for record by the register of deeds of any county of this state unless that instrument complies with each of the following requirements:
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> * * *

> (1) Subject to subsection (2) and in the courts of this state, the certificate of a notary public of official acts performed in the capacity of a notary public, under the seal of office, is presumptive evidence of the facts contained in the certificate except that the certificate is not evidence of a notice of nonacceptance or nonpayment in any case in which a defendant attaches to his or her pleadings an affidavit denying the fact of having received that notice of nonacceptance or nonpayment.
>
> (2) Notwithstanding subsection (1), the court may invalidate any notarial act not performed in compliance with this act. [MCL 55.307.]

However, the probate court failed to recognize that under Michigan law, an invalid acknowledgment does not render void an otherwise valid conveyance of real estate. It is well settled that

> [d]eeds of real estate, to be entitled to record, must be acknowledged, but an acknowledgment is not a part of the conveyance. Title to real estate may be transferred by conveyances not acknowledged. Deeds in order to be recorded should be witnessed, but a deed not witnessed is good between the parties. [*Kerschensteiner v Northern Mich Land Co*, 244 Mich 403, 417; 221 NW 322) (1928) (citations omitted).]

Likewise, in the absence of fraud, duress, or coercion, "[t]his court has upon many occasions held that an acknowledgment is not necessary to give validity to a conveyance, the purpose of acknowledgment being to entitle the instrument to record." *Turner v Peoples State Bank*, 299 Mich 438, 450; 300 NW 353 (1941). See also *Irvine v Irvine*, 337 Mich 344, 352; 60 NW2d 298 (1953) ("It is well settled by prior decisions of this

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> (c) The name of any notary public whose signature appears upon the instrument is legibly printed, typewritten, or stamped upon the instrument immediately beneath the signature of that notary public.

Court that an instrument of conveyance is good as between the parties even though not executed with such formalities as to permit it to be recorded."); *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 82; 308 NW2d 440 (1981).

Furthermore, MCL 565.604 expressly provides that a deed may remain valid even if the acknowledgment is defective. In relevant part, MCL 565.604 states:

> No conveyance of land or instrument intended to operate as such conveyance, made in good faith and upon a valuable consideration, whether heretofore made or hereafter to be made, shall be wholly void by reason of any defect in any statutory requisite in the sealing, signing, attestation, *acknowledgment*, or certificate of acknowledgment thereof; . . . but the same, when not otherwise effectual to the purposes intended, may be allowed to operate as an agreement for a proper and lawful conveyance of the premises in question, and may be enforced specifically by suit in equity in any court of competent jurisdiction, subject to the rights of subsequent purchasers in good faith and for a valuable consideration; and when any such defective instrument has been or shall hereafter be recorded in the office of the register of deeds of the county in which such lands are situate, such record shall hereafter operate as legal notice of all the rights secured by such instrument. [Emphasis added.]

In the probate court, petitioners argued that this "savings statute" was inapplicable to the instant case because the deed was not made in good faith and for a valuable consideration. The court, however, did not make any findings regarding whether good faith and valuable consideration were present. Therefore, given the relevant caselaw and the text of MCL 565.604, we conclude that the probate court erred by setting aside the deed solely due to a defect in the acknowledgment without also finding a lack of good faith or valuable consideration, or the presence of another invalidating

circumstance, such as fraud, legally sufficient mistake, coercion, or undue influence. See *Schmalzriedt v Titsworth*, 305 Mich 109, 118-120; 9 NW2d 24 (1943). Accordingly, we reverse the probate court's order and remand this case for further evidence to be taken on the issues of good faith and consideration, and any other relevant issues. MCR 7.216(A)(5).

In concluding that remand is necessary in this case, we decline to accept petitioners' argument that it is clear that the conveyance was not supported by valuable consideration. Petitioners assert that, because the deed states that it was executed for "valuable consideration in the amount of One ($1.00) Dollars," the deed is a gift on its face. In general, "[t]o have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). "Courts do not generally inquire into the *sufficiency* of consideration. It has been said '[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.' " *Id*. at 239 (citations omitted). However,

> *the rule in Michigan is* [*also*] *that a deed's recital of valuable consideration is not conclusive regarding whether the property was actually sold for value.* "The consideration recited in a deed is not conclusive, but can afterwards be inquired into." And with respect to the issue of parol evidence, our Supreme Court has specifically held that "[w]hile the consideration expressed in a written instrument is *prima facie* to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was . . . different from that expressed." [*In re Rudell Estate*, 286 Mich App 391, 410; 780 NW2d 884 (2009) (citations omitted; first emphasis added; second alteration in original).]

Petitioners cite *Daane v Lovell*, 83 Mich App 282, 292; 268 NW2d 377 (1978), in support of their conten-

tion that the deed is a gift. In *Daane*, the stated consideration for the deed at issue there was "One Dollar ($1.00) and other valuable considerations less than Ten Dollars ($10.00)." *Id*. at 296 (HOLBROOK, J., dissenting). This Court found that, "[*u*]*pon reviewing the entire record*, we are satisfied that the transaction was intended as a gift." *Id*. at 292 (opinion of the Court) (emphasis added). The majority opinion includes no discussion of whether such consideration was actually paid, and the dissenting opinion suggests that it was evident from the testimony that no consideration was actually paid. *Id*. at 296, 304-306 (HOLBROOK, J., dissenting). Additionally, the circumstances of the *Daane* case did not involve a deed that was defective due to a deficiency in the sealing, signing, attestation, acknowledgment, or certificate of acknowledgment. In addition, whether valuable consideration was present for purposes of MCL 565.604 was not at issue in *Daane*. Accordingly, we conclude that this Court's holding in *Daane* does not require holding as a matter of law that the deed in dispute in the instant case was a gift unsupported by consideration.[6]

Therefore, because the probate court did not consider the circumstances surrounding the stated consideration or whether *in fact* consideration was provided

[6] Accord *Takacs v Takacs*, 317 Mich 72, 82; 26 NW2d 712 (1947) (finding that a conveyance of property was a gift when the deed recited consideration of one dollar, and the parties "*conceded* . . . that the grantees made no payment of any kind to plaintiff, nor was there any agreement on their part to support him in the future, or otherwise to do anything for his benefit") (emphasis added); *Fischer v Union Trust Co*, 138 Mich 612, 614; 101 NW 852 (1904) ("To say that the one dollar was the real, or such valuable consideration as would of itself sustain a deed of land worth several thousand dollars, is not in accord with reason or common sense. The passing of the dollar by the brother to his sister, and by her to her father, *was treated rather as a joke* than as any actual consideration. . . . The deed was a gift . . . .") (emphasis added).

in exchange for the conveyance, we find that remand is necessary for the trial court to factually determine, for purposes of MCL 565.604, whether the conveyance was made upon a valuable consideration, and whether the conveyance was made in good faith.

V

Finally, defendant argues that the probate court erred by granting petitioners' petition "in summary fashion" because it evaluated credibility and made factual findings regarding the date on which the deed was executed without holding an evidentiary hearing. Given our conclusion that remand is necessary for further evidence to be taken on the issues of good faith and consideration, MCR 7.216(A)(5), we need not consider the merits of this argument.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No party having prevailed in full, no costs may be taxed. MCR 7.219(A).

SHAPIRO and RONAYNE KRAUSE, JJ., concurred with WILDER, P.J.

VARRAN v GRANNEMAN

Docket Nos. 321866 and 322437. Submitted June 9, 2015, at Lansing. Decided October 13, 2015, at 9:10 a.m.

Emily Varran, through her mother and next friend Julia Varran, filed a complaint in the Washtenaw Circuit Court, seeking to determine paternity and custody of a then three-month-old child she had conceived with defendant Peter Granneman. Emily initially had custody of the child, but at eight months of age the child went to live with Peter. Peter, a minor himself at the time, lived with his own parents, Debora and James Granneman. After Peter turned 18, and the child was a little over one year old, the court entered a consent judgment giving Peter full custody. Emily was awarded supervised parenting time, which she exercised sporadically until her death in 2007. When the child was approximately 2½ years old, Peter moved out of his parents' home. The child generally remained with Peter's parents, but would spend one or two nights a week with Peter. By the summer of 2012, the child had begun living with Peter during the week and visiting with Peter's parents on the weekend. The child's visitation time with Peter's parents was later reduced to every other weekend. In May 2013, Peter advised his parents that they would no longer be permitted to have overnight visits with the child. Peter's parents intervened in the custody action, moving for grandparenting time. The court, Carol Kuhnke, J., awarded grandparenting time to Peter's parents, and subsequently entered an order specifically providing them with visitation every other Saturday from 10:00 a.m. until Sunday at 6:00 p.m. Peter appealed both the opinion (Docket No. 321866) and the order (Docket No. 322437). The Court of Appeals dismissed the appeals for lack of jurisdiction. Peter sought leave to appeal. In lieu of granting leave to appeal, the Supreme Court vacated the orders of dismissal and remanded the case to the Court of Appeals for further consideration. 497 Mich 928 (2014); 497 Mich 929 (2014).

On remand, the Court of Appeals *held*:

1. Under MCR 7.203(A)(1), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a final

judgment or order of a circuit court as defined by MCR 7.202(6). MCR 7.202(6)(a)(iii) defines the terms "final judgment" and "final order" in a domestic relations action as including a postjudgment order affecting the custody of a minor. The plain language of the terms used in MCR 7.202(6)(a)(iii) does not distinguish between physical and legal custody. Accordingly, a postjudgment order affecting the custody of a minor is an order that produces an effect on, or influences in some way, the legal or physical custody of a minor. While an order for grandparenting time cannot change the legal or physical custody of a child, it can affect the custody of a child. A parent has a fundamental right, protected by the Due Process Clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of his or her child. A grandparenting-time order interferes with that right. Accordingly, when a parent has legal custody of a child, an order regarding grandparenting time is a postjudgment order affecting custody of the minor. In this case, because Peter had legal custody of the child, the court's order specifying the grandparenting-time schedule affected custody of the child, making it a final order under MCR 7.202(6)(a)(iii), and, therefore, appealable by right under MCR 7.203(A)(1). Because the Court had jurisdiction over Peter's claim of appeal in Docket No. 322437, the Court treated the claim of appeal in Docket No. 321886 as an application for leave to appeal and granted it.

2. In order to give deference to the decisions of fit parents, under the grandparenting-time statute, MCL 722.27b, it is presumed that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child. To rebut the presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. This statutory presumption is consistent with the requirements of United States Supreme Court and Michigan Supreme Court precedent. The use of a clear-and-convincing-evidence standard of proof, rather than a preponderance-of-the-evidence standard, is not constitutionally required. A parent's fundamental right to make decisions concerning the care, custody, and control of their children is not most at jeopardy when a grandparent petitions a court for grandparenting time; an order of grandparenting time does not sever a parent's rights to a child. Accordingly, the requirement that a grandparent, in order to rebut the presumption given to a fit parent's decision, prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child is sufficient to protect the

fundamental rights of the parent. Peter's facial challenge to the constitutionality of the grandparenting-time statute thus failed.

3. There are two ways that an action for grandparenting time can be commenced under MCL 722.27b: (1) if the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction, and (2) if the circuit court does not have continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting-time order by filing a complaint in the circuit court for the county where the child resides. Under the Child Custody Act, MCL 722.21 *et seq*., when a child custody dispute has been submitted to the trial court, either as an original action under the act or when it has arisen incidentally in another action in the trial court, the trial court may, upon petition, consider the reasonable grandparenting time of maternal or paternal grandparents as provided in MCL 722.27b. Accordingly, the trial court had subject-matter jurisdiction to hear the motion brought by Peter's parents for grandparenting time.

4. MCL 722.27b(4) states that in order to give deference to the decisions of fit parents, it is presumed that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. Relying on this language, Peter contended that to obtain an order for grandparenting time, a grandparent must first establish that the parent refused all visitation between the child and the grandparent. But nothing in MCL 722.27b(1), which sets forth when a grandparent may seek a grandparenting-time order, requires that there be a denial of grandparenting time before a grandparent may seek a grandparenting-time order. The Legislature's intent in enacting MCL 722.27b(4)(b) was not to set forth requirements for when a grandparent may seek an order for grandparenting time (as it had already done in MCL 722.27b(1)), but merely to provide a scheme in which a parent's decision regarding visitation is given deference.

5. The trial court initially qualified psychologist Nancy Fishman as an expert and permitted her to testify as an expert, but later disqualified her and ruled that it would disregard opinions that she had proffered as an expert. Nonetheless, in finding that there would be a substantial risk of harm to the child's mental and emotional health if grandparenting time were not granted, the trial court relied on statements the child made to Fishman. Peter affirmatively waived any hearsay objection to the admission of the child's statements to Fishman, thereby allowing the

facts and data on which Fishman based her opinion to be admitted into evidence. Accordingly, Peter could not argue on appeal that the trial court erred by considering those statements.

6. Orders concerning grandparenting time may be reversed if the trial court's findings of fact were against the great weight of the evidence. In this case, the evidence showed that the child lived with his grandparents for numerous years and that the grandparents raised the child as their own. The child's statements indicated that he saw his grandparents as parental figures and not only that he wanted to spend time with them, but that he would be angry, sad, and depressed if he could not. The evidence did not clearly preponderate against the trial court's finding that a denial of grandparenting time would create a substantial risk of harm to the child's mental and emotional health.

Affirmed.

MURPHY, J., dissenting, concluded that Peter was required to pursue his appeal by an application for leave and, therefore, would have dismissed Peter's claims of appeal for lack of jurisdiction. The Supreme Court's intent in drafting MCR 7.202(6)(a)(iii) was to allow for an appeal of right solely with respect to postjudgment orders in domestic relations actions in which a court either granted a motion that effectively sought to change the legal or physical custody of a minor or denied such a motion. The Supreme Court did not intend to provide for an appeal of right in cases involving a postjudgment order in which a court ruled on a motion for or to modify grandparenting or parenting time, neither of which is mentioned in MCR 7.202(6)(a)(iii). In the simplest of terms relative to postjudgment proceedings, custody decisions are appealable of right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(iii), and grandparenting- and parenting-time decisions are appealable by applications for leave to appeal under MCR 7.203(B). The majority's contrary interpretation is not consistent with the language of the court rules. The trial court's order here did not have an effect on or influence where the child would live; therefore, it was not a postjudgment order affecting the physical custody of a minor for purposes of MCR 7.202(6)(a)(iii).

1. PARENT AND CHILD — POSTJUDGMENT ORDERS AFFECTING CUSTODY — APPEALS OF RIGHT — GRANDPARENTING TIME.

A postjudgment order affecting the custody of a minor is an order that produces an effect on, or influences in some way, the legal or physical custody of a minor; an order for grandparenting time can

affect the custody of a child, making it a final order under MCR 7.202(6)(a)(iii), and, therefore, appealable by right under MCR 7.203(A)(1).

2. PARENT AND CHILD — GRANDPARENTING TIME — STANDARD OF PROOF — CONSTITUTIONALITY.

The requirement of MCL 722.27b that a grandparent, in order to rebut the presumption given to a fit parent's decision to deny grandparenting time, only needs to prove by a preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child's mental, physical, or emotional health is facially constitutional.

3. PARENT AND CHILD — GRANDPARENTING TIME — PREREQUISITES.

There is no requirement under MCL 722.27b that there be a denial of grandparenting time before a grandparent may seek a grandparenting-time order.

Legal Services of South Central Michigan (by *Tracy E. Van den Bergh*, *Ann L. Routt*, and *Jessica K. Hirsh*) for Peter Granneman.

Daniel R. Victor, PLLC (by *Daniel R. Victor*), for Debora and James Granneman.

Amicus Curiae:

Anne L. Argiroff, *Judith A. Curtis*, *Kevin S. Gentry*, *Liisa R. Speaker*, and *Trish Oleksa Haas* for the Michigan Coalition of Family Law Appellate Attorneys.

Before: RONAYNE KRAUSE, P.J., and MURPHY and SERVITTO, JJ.

SERVITTO, J. These matters are before us on remand from our Supreme Court for further consideration of our June 20, 2014 order dismissing Peter Granneman's claim of appeal in Docket No. 321866 for lack of jurisdiction and our July 16, 2014 order dismissing his

claim of appeal in Docket No. 322437 for the same reason. The Supreme Court directed us to "issue an opinion specifically addressing the issue of whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Varran v Granneman*, 497 Mich 928 (2014); *Varran v Granneman*, 497 Mich 929 (2014).

Plaintiff, Emily Varran (Mother), who is deceased, and defendant, Peter Granneman (Father), are the parents of a minor child (referred to as "A" hereafter), born in 2002, when the parents were both minors. The parents never married. Mother initially had custody of A, but when A was 8 months old he went to live with Father, who resided with his parents, intervening petitioners (Grandparents). This arrangement continued until 2005 when A was 2½ years old. At that time, Grandparents asked Father to leave their home because of hostility and conflicts. A continued to reside with Grandparents, and Father initially visited A once a week at Grandparents' home. Within a few months, Father had A with him on Saturday nights at his apartment.

Mother passed away in 2007. In 2007, Father began having A stay with him on Friday and Saturday nights. In the summer of 2012, A began living with Father during the week and visiting with Grandparents every weekend. In the spring of 2013, Father reduced A's visits with Grandparents to every other weekend. In May 2013, Father advised Grandparents that they would no longer have overnight visits with A and that any contact between them and A would be under Father's supervision.

Grandparents, as intervening petitioners, filed a motion for grandparenting time with A in June 2013.

In a July 2013 order, the trial court awarded Grandparents temporary visitation with A every other weekend from Saturday at 10:00 a.m. to Sunday at 6:00 p.m. and set the matter for an evidentiary hearing. At the conclusion of the evidentiary hearing, the trial court issued a written opinion on April 25, 2014, wherein it determined that A would suffer a substantial risk of future harm to his mental and emotional health if grandparenting time were not granted. The trial court additionally applied the best-interest factors set forth in MCL 722.27b(6) and found that it was in A's best interest to allow grandparenting time. The trial court thereafter, on May 30, 2014, entered an order providing Grandparents with visitation with A every other Saturday from 10:00 a.m. until Sunday at 6:00 p.m. Father claimed an appeal from the trial court's April 25, 2014 opinion granting grandparenting time (Docket No. 321866) and its May 30, 2014 order setting a specific grandparenting-time schedule (Docket No. 322437). As previously indicated, this Court initially dismissed both appeals, but our Supreme Court remanded the appeals, directing us to address "whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." The Supreme Court further directed that if this Court determines that the lower court order is appealable by right, we must take jurisdiction over Father's claims of appeal and address their merits. *Varran*, 497 Mich at 928; *Varran*, 497 Mich at 929. We consolidated the appeals.

I. APPLICATION OF MCR 7.202(6)(a)(iii)

The first issue for resolution is, as directed by the Supreme Court, whether an order for grandparenting

time affects custody within the meaning of MCR 7.202(6)(a)(iii), making it appealable as of right under MCR 7.203(A). Whether this Court has jurisdiction to hear an appeal is an issue reviewed de novo. *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). The interpretation and application of a court rule is a question of law that this Court reviews de novo. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

MCR 7.203(A) provides:

> The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
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> (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court
>
> (a) on appeal from any other court or tribunal;
>
> (b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere:
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> An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.
>
> (2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.

MCR 7.202(6)(a) defines a "final judgment" or "final order" in a civil case as the following:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,
>
> (ii) an order designated as final under MCR 2.604(B),
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

> (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,
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> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity[.]

The rules of statutory interpretation apply to the interpretation of court rules. *Reed v Breton*, 279 Mich App 239, 242; 756 NW2d 89 (2008). The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. *Id*. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009).

On appeal, Father and Grandparents limit their arguments to whether an order regarding grandparenting time is a postjudgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii). However, this Court was not tasked by the Supreme Court with only determining whether an order regarding parenting time was a "final judgment" or "final order" under MCR 7.202(6)(a)(iii). It was also tasked with determining whether an order regarding grandparenting time would otherwise be appealable by right under MCR 7.203(A). *Varran*, 497 Mich at 929; *Varran*, 497 Mich at 928. Under MCR 7.203(A)(1), this Court has jurisdiction of an appeal of right from a final judgment

or order of the trial court, as defined in MCR 7.202(6), while under MCR 7.203(A)(2), this Court has jurisdiction of an appeal of right from a judgment or order for which an appeal of right has been established by law or court rule. There is no law or court rule providing an appeal by right from an order regarding grandparenting time. Therefore, under MCR 7.203(A), there is only an appeal by right from an order regarding grandparenting time if the order is a "final order" or "final judgment" as defined in MCR 7.202(6). MCR 7.203(A)(1).

Two definitions of a "final judgment" or "final order" are potentially applicable to the present case: (1) "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment," MCR 7.202(6)(a)(i), and (2) "a postjudgment order affecting the custody of a minor," MCR 7.202(6)(a)(iii). We will address each in turn.

The grandparenting-time statute provides two ways that an action for grandparenting time can be commenced. MCL 722.27b(3) states:

> A grandparent seeking a grandparenting time order shall commence an action for grandparenting time, as follows:
>
> (a) If the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction.
>
> (b) If the circuit court does not have continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a complaint in the circuit court for the county where the child resides.

In this case, Grandparents did not commence their action for grandparenting time by filing a complaint. Instead, a child custody dispute concerning A was initiated by A's mother in the trial court in 2003. Grandparents sought grandparenting time by filing a motion with the trial court in that case. The trial court found that entry of a grandparenting-time order would be in the best interests of A and entered such an order on May 30, 2014. Because the May 30, 2014 order provided a grandparenting-time schedule, it disposed of Grandparents' claim for grandparenting time and adjudicated the rights and liabilities of Father and Grandparents. It cannot be ignored, however, that MCR 7.202(6)(a)(i) specifically defines a "final judgment" or "final order" to mean "*the* first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." (Emphasis added). Use of the singular definite article "the" before "first judgment" contemplates *one* order in a civil action. See, e.g., *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). When A's mother initiated the custody case in 2003, the parties to that case were Mother and Father and the first order that disposed of the claims and adjudicated all the rights and liabilities of Mother and Father was the February 2004 consent order regarding custody, parenting time, and support of A. Accordingly, under the definition of MCR 7.202(6)(a)(i), the February 2004 consent order was the "final judgment" or "final order." Because there was no reversal of the February 2004 consent order, no subsequent order in the case could be considered a "final judgment" or "final order" under MCR 7.202(6)(a)(i). The May 31, 2014 order in this case is therefore not a "final judgment" or "final order" under MCR 7.202(6)(a)(i).

We next turn to whether an order regarding grandparenting time is a postjudgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii). Helpful to this Court's resolution is a review of the few cases that have addressed MCR 7.202(6)(a)(iii). In *Thurston v Escamilla*, 469 Mich 1009 (2004), our Supreme Court determined that a postdivorce order granting a parent's motion for a change of domicile was an order affecting the custody of the minors and was thus a final order, appealable by right. In that case, the divorce judgment had previously awarded joint legal and physical custody to both parties and the change of domicile allowed one of the parties to move, with the children, to New York.

In *Wardell v Hincka*, 297 Mich App at 132-133, a panel of this Court took a close look at the definition of "affect" when determining whether the denial of a postjudgment motion for change of custody was an order "affecting the custody of a minor" under MCR 7.202(6)(a)(iii) and thus appealable as of right:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable

> by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [Alteration in original.]

In *Rains v Rains*, 301 Mich App 313, 315; 836 NW2d 709 (2013), the trial court awarded the parties joint legal and physical custody of their child in a judgment of divorce. The judgment also established a parenting-time schedule. Approximately two years later, the mother moved for a change in domicile, seeking to move the child with her to Traverse City and to modify the parenting-time schedule. The father, in response, moved for primary physical custody. The trial court denied the mother's request for a change in domicile, *id*. at 319, and this Court held that the mother presented an appeal from a final order under MCR 7.202(6)(a)(iii), despite the father's claim that because the trial court's decision effectively left the parties' custody arrangement as it was, it did not affect the custody of the minor child, *id*. at 321-324. The *Rains* Court based its decision, in part, on *Wardell*, 297 Mich App 127, noting that under *Wardell*, a trial court need not change a custodial arrangement in order for its decision to affect custody. *Rains*, 301 Mich App at 323. Rather, the inquiry was "whether the trial court's order denying plaintiff's motion for a change of domicile influences where the child will live, regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.' " *Id*. at 321 (quotation marks omitted). From *Rains* and *Wardell*, it can be gleaned that when a motion addresses the amount of time a parent spends with a child such that it would potentially cause a change in the established custodial

environment, an order regarding that motion is a final order under MCR 7.202(6)(a)(iii).

MCR 7.202(6)(a)(iii) requires that the order, to be considered a final order appealable by right, affect the "custody" of the minor child. "Custody," like "affect," is not defined in Chapter 7 of the Michigan Court Rules. The term "custody" as used in the family law context is, however, defined in *Black's Law Dictionary* (10th ed) as follows:

> The care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody [usually] grants both rights. [Formatting altered.]

Further, "the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013). We recognize that the Michigan cases thus far addressing MCR 7.202(6)(a)(iii) have addressed physical custody and have thus focused their inquiries on the effect of the challenged order on where the child would live. It would thus be tempting to conclude that this Court rule only comes into play when the physical custody of a child is at issue. Although there is a distinction between physical and legal custody, MCR 7.202(6)(a)(iii) contains no distinguishing or limiting language. Based on the plain language of the terms used in MCR 7.202(6)(a)(iii), then, a "postjudgment order affecting the custody of a minor" is an order that produces an effect on or influences in some way the legal custody *or* physical custody of a minor.

The grandparenting-time statute, MCL 722.27b, does not *grant* legal custody or physical custody of a child to a grandparent who has obtained a grandparenting-time order. Thus, an order for grandparenting time cannot alter or change the legal custody or physical custody of a child. But that does not mean that an order for grandparenting time cannot affect (i.e., produce an effect on or influence) the custody of a child. In *Thurston*, 469 Mich at 1009, for example, despite the fact that the trial court's order that granted the mother's motion for change in domicile did not alter the award of joint legal and physical custody, the Supreme Court still held that the order was one affecting the custody of a minor.

According to Father, an order for grandparenting time is one that affects the custody of a minor because it interferes with a parent's right to determine the care, custody, and control of his or her child. A parent has a fundamental right, one that is protected by the Due Process Clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of his or her child. *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.); *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014). It cannot be disputed that a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child. Although a parent has denied grandparenting time, a grandparent may obtain an order for grandparenting time if the grandparent proves by a preponderance of the evidence that the denial of grandparenting time will create a substantial risk of harm to the child and if the trial court finds by a preponderance of the evidence that a grandparenting-time order is in the child's best interests. MCL 722.27b(4)(b) and (6). Because a grandparenting-time order overrides a parent's

legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. Thus, when a parent has legal custody of the child, an order regarding grandparenting time is a postjudgment order affecting the custody of a minor. MCR 7.202(6)(a)(iii). Because Father had legal custody of A, we hold that the May 30, 2014 order was a "final judgment" or "final order" under MCR 7.202(6)(a)(iii) and, therefore, appealable by right, MCR 7.203(A)(1).

It is true, as the dissent points out, that the award or denial of grandparenting time did not change the legal-custody arrangement between Father and now deceased Mother and did not deprive Father of sole legal custody of A. But a "change" in custody is not what is required under MCR 7.202(6)(a)(iii)—the language of the rule requires only an order "affecting" custody, which is materially different. Furthermore, it cannot be ignored that this dispute does not concern a motion to resolve a postjudgment dispute between two parents. Generally, when postjudgment custody issues warrant the trial court's involvement it is because the two people who have the same fundamental rights to the care and custody of the same child (including decision-making authority) are at odds and the court is required to resolve a stalemate. In this case, however, the dispute concerns the trial court's award of visitation to third parties—who are not vested with the fundamental rights that are ordinarily reserved for parents—against the express decision of A's only living parent and, thus, the only parent with legal and physical custody. Moreover, during those periods of visitation, A's Grandparents will impliedly have at least some of the rights generally reserved for parents with legal or physical custody (e.g., whether and how to

treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child). Thus, the award of grandparenting time affected the custody of A.

In accordance with the foregoing analysis and pursuant to the Supreme Court's remand order in Docket No. 322437, we take jurisdiction over Father's claim of appeal and address the merits of the arguments raised by Father. We will also treat the claim of appeal in Docket No. 321866 as an application for leave to appeal and grant it.

II. CONSTITUTIONALITY OF THE GRANDPARENTING-TIME STATUTE

Father argues on appeal that the grandparenting-time statute is unconstitutional. We disagree.

This Court reviews constitutional issues de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). Statutes are presumed constitutional, and this Court has a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Cadillac Mayor v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). The burden of proving that a statute is unconstitutional is on the party challenging the statute. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

The Fourteenth Amendment of the United States Constitution, US Const, Am XIV, prohibits a state from depriving any person of life, liberty, or property without due process of law. *Sanders*, 495 Mich at 409. This promise of due process includes "a substantive component that provides heightened protection against government interference with certain funda-

mental rights and liberty interests." *Id*. (quotation marks and citation omitted). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. *Id*. In other words, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

MCL 722.27b(4) provides:

> All of the following apply to an action for grandparenting time under [MCL 722.27b(3)]:
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> * * *
>
> (b) In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.
>
> (c) If a court of appellate jurisdiction determines in a final and nonappealable judgment that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b).

Father argues that the grandparenting-time statute is unconstitutional because of the use of the preponderance-of-the-evidence standard. He contends that use of a clear-and-convincing-evidence standard is necessary to protect a parent's fundamental right to make decisions concerning the care, custody, and control of his or her children. While Father contends that the statute is unconstitutional both on its face and as applied to the present case, his argument, as presented, is actually only a facial challenge. "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998) (quotation marks and citations omitted; alteration in original). In contrast, an as-applied challenge "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (quotation marks and citation omitted).

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Cruzan v Missouri Dep't of Health Dir*, 497 US 261, 282; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (quotation marks and citations omitted). "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v Kramer*, 455

US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982). "Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' " *Id*. (citation omitted). The United States Supreme Court has mandated an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake are both "particularly important" and "more substantial than mere loss of money." *Id*. at 756 (quotation marks and citation omitted). In *Santosky*, the United States Supreme Court held that a state, before it may terminate parental rights, must support its allegations by clear and convincing evidence. *Id*. at 747-748, 768-770.

Father is correct that the United States Supreme Court has observed that one of the oldest recognized liberty interests is that of a parent to determine the care, custody, and control of his or her children, including the children's associations. See *Troxel*, 530 US 57. While the Supreme Court in *Troxel* did address a grandparent-visitation statute and rule that it was unconstitutional, the statute in this case is not contrary to *Troxel*.

In *Troxel*, 530 US 61 (opinion by O'Connor, J.), a Washington statute provided that " '[a]ny person may petition the court for visitation rights' " and that " '[t]he court may order visitation rights for any person when visitation may serve the best interest of the child . . . .' " (Citation omitted.) Under this statute, the grandparents moved for greater visitation with their two granddaughters than the children's mother would allow. The trial court granted the requested visitation.

The United States Supreme Court held that the Washington statute was unconstitutional. Justice O'Connor, writing for a plurality of the Court, concluded that the Washington statute, when applied to the case, infringed the mother's fundamental rights as a parent. *Id*. at 67-68, 72-73. It was never alleged, and there was no finding, that the mother was an unfit parent. *Id*. at 68. This was important, Justice O'Connor stated, because "there is a presumption that fit parents act in the best interests of their children." *Id*. She explained that the problem was not that the trial court intervened but that when it did, it gave no special weight to the mother's determination of her daughters' best interests. *Id*. at 69. "[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id*. at 70. Justice O'Connor also noted that there was no allegation that the mother ever sought to preclude all visitation, and the trial court gave no weight to the mother's acquiescence to some visitation. *Id*. at 71. She concluded that the Washington statute was unconstitutional as applied because it failed to afford the determination of the mother, a fit parent, any material weight. *Id*. at 72. According to the plurality opinion in *Troxel*, then, in order to protect a parent's fundamental right to raise his or her children, a visitation statute must require that the trial court afford deference to the decisions of a fit parent regarding third-party visitation.

The grandparenting-time statute at issue in this case requires that the trial court afford deference to a fit parent's decision to deny grandparenting time. There is a presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child. MCL 722.27b(4)(b). To rebut this presumption, a grandparent must prove by a

preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child. *Id*. Thus, the grandparenting-time statute does not allow a trial court to grant grandparenting time simply because it disagrees with the parent's decision. It thus abides by the *Troxel* deference requirement. The *extent* of deference that must be afforded, however, was not discussed in *Troxel* and forms the heart of Father's argument—that the amount of deference required by the statute is inadequate, rendering the statute unconstitutional.

On this issue, Father relies principally on *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009). In *Hunter*, 484 Mich 247, the Supreme Court addressed the conflicting presumptions that arise under the Child Custody Act (CCA), MCL 722.21 *et seq*., when there is a custody dispute between a parent and a third party with whom a child has an established custodial environment. Under MCL 722.25(1), in a custody dispute between a parent and a third party, the court "shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." Under MCL 722.27(1)(c), a court may not modify a previous custody order or issue a new custody order so as to change the established custodial environment unless there is clear and convincing evidence that the change is in the best interest of the child. The Supreme Court held that, in order to protect a fit parent's fundamental constitutional rights, the parental presumption of MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c). *Hunter*, 484 Mich at 263-264. The Supreme Court then addressed a "remaining constitutional question" regarding the amount of deference due under *Troxel* to fit parents. *Id*.

at 264. The Court concluded that MCL 722.25(1) provides sufficient deference to fit parents' fundamental rights to the care, custody, and management of their children because it requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the parent is not in the child's best interests. *Id*. at 264-265. The Supreme Court summarized the clear-and-convincing evidence standard:

> The clear and convincing evidence standard is "the most demanding standard applied in civil cases . . . ." This showing must " 'produce[] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' " [*Id*. at 265 (citations omitted; alterations in original).]

The Supreme Court concluded that requiring a third party to establish by clear and convincing evidence that it is not in the child's best interests for the parent to have custody "was entirely consistent with *Troxel*'s holding." *Id*. It explained, "Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a 'presumption of validity' or 'some weight.' That is precisely what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption." *Id*.

Hunter is minimally instructive in the present case. The Supreme Court in *Hunter* merely concluded that MCL 722.25(1) provides sufficient deference to a fit parent's fundamental rights to the care, custody, and management of their child because it requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the parent is not in the child's best interests. However, in *Hunter*, a preponderance-of-the-evidence standard was not at issue, nor

was it ever discussed. The Supreme Court never said that a clear-and-convincing-evidence standard, rather than a preponderance-of-the-evidence standard, was constitutionally mandated. It simply declared that the standard, as set forth in the statute, was sufficient.

As previously stated, the grandparenting-time statute is consistent with *Troxel*. Because the grandparenting-time statute presumes that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child, and because it requires a grandparent to prove by a preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child, the statute gives deference to the decisions of a fit parent. See *DeRose v DeRose*, 469 Mich 320, 332; 666 NW2d 636 (2003).[1] It does not allow the trial court to grant grandparenting time simply because it disagrees with the parent's decision. See *id*. Moreover, a parent's fundamental right to make decisions concerning the care, custody, and control of their children is not most at jeopardy when a grandparent petitions a court for grandparenting time. See *Hunter*, 484 Mich at 269. An order granting grandparenting time does not sever, permanently and irrevocably, a parent's parental

[1] The Legislature rewrote the grandparenting-time statute in 2004 (2004 PA 542) after the *DeRose* Court, 469 Mich at 333-334, held that a prior version of the statute was unconstitutional under *Troxel* because it did not require that any deference be given to the decisions that a fit parent makes for his or her child. The Legislature included the language requiring that deference be given to the decisions of fit parents in the rewritten grandparenting-time statute so that the statute would comply with *Troxel* and *DeRose*. See *Keenan v Dawson*, 275 Mich App 671, 678-679; 739 NW2d 681 (2007), in which this Court stated that *Troxel* and *DeRose* "directly led to the 2004 amendment of MCL 722.27b" and that, in response to the those decisions, the Legislature attempted to correct the constitutional infirmities of the grandparenting-time statute.

rights to a child, and it remains subject to modification and termination. Therefore, we conclude that, because due process concerns are not at their highest in cases involving requests for grandparenting time, see *id*., the requirement that grandparents, in order to rebut the presumption given to a fit parent's decision, prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child is sufficient to protect the fundamental rights of parents. Father's facial challenge to the constitutionality of the grandparenting-time statute thus fails.

III. SUBJECT-MATTER JURISDICTION

Father next contends that the trial court lacked jurisdiction to hear Grandparents' motion for grandparenting time. We disagree.

As explained in Part I of this opinion, there are two ways that an action for grandparenting time can be commenced: (1) "[i]f the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction" and (2) "[i]f the circuit court does not have continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a complaint in the circuit court for the county where the child resides." MCL 722.27b(3).

Father argues that the trial court lacked subject-matter jurisdiction over Grandparents' motion for grandparenting time because the court did not have continuing jurisdiction over A. According to Father, the trial court did not have continuing jurisdiction over A

because Father was awarded sole legal and physical custody over A in 2004 and Mother died in 2007.

Subject-matter jurisdiction is the right of the a court

> to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. [*Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (citation and quotation marks omitted).]

A trial court's lack of subject-matter jurisdiction renders a trial court's judgment void. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992); *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992). However, the only support Father has cited in support of his argument is an unpublished opinion per curiam of the Court of Appeals. Unpublished decisions are not binding on the Court. MCR 7.215(C)(1) and (J)(1).

Trial courts have subject-matter jurisdiction over child custody disputes. *Bowie*, 441 Mich at 39. Additionally, the power to hear and decide requests by a child's grandparents for grandparenting time has not been prohibited or given exclusively to another court. See *id*. Pursuant to the CCA, when a child custody dispute has been submitted to the trial court, either as an original action under the CCA or when it has arisen incidentally in another action in the trial court, the trial court may "[u]pon petition consider the reasonable grandparenting time of maternal or paternal grandparents as provided in [MCL 722.27b] . . . ." MCL 722.27(f). Accordingly, the trial court had subject-matter jurisdiction to hear Grandparents' motion for grandparenting time. It had the right to

exercise judicial power over requests by a child's grandparents for grandparenting time. See *Joy*, 287 Mich at 253-254.

IV. INTERPRETATION OF MCL 722.27b

Father contends that to obtain grandparenting time under the statute, a grandparent must first demonstrate that a fit parent's decision to *deny* grandparenting time creates a substantial risk of harm to the child and that he did not *deny*, i.e., refuse or reject, all visitation between Grandparents and A. According to Father, Grandparents are therefore not eligible for relief under MCL 722.27b and the trial court erred by interpreting the word "deny" in any other manner in order to allow relief.

" 'Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.' " *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007) (citation omitted; alteration in original). Issues of statutory interpretation are questions of law. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002). Questions of law are reviewed for clear legal error. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013) (citation and quotation marks omitted).

The goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). The rules of statutory construc-

tion serve as guides to assist in determining legislative intent with a greater degree of certainty. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 313; 683 NW2d 148 (2004). Statutory language should be construed reasonably, keeping in mind the purpose of the statute. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Once the intention of the Legislature is discovered, it must prevail over any conflicting rule of statutory construction. *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004).

The best indicator of legislative intent, and the first thing to be examined when determining intent, is the language of the statute. *Tevis*, 283 Mich App at 81. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). Every word of a statute is presumed to have some meaning, and this Court must avoid an interpretation that renders any part of the statute surplusage or nugatory. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011). Effect should be given to every sentence, phrase, clause, and word. *Id*. Each word, unless specifically defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. *TMW Enterprises, Inc*, 285 Mich App at 172. Additionally, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Another rule of statutory construction is that statutory provisions are not to be read in isolation. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Rather, to discern the true intent of the Legislature, statutory provisions must be read as a whole. *Id*.

Father's argument is premised on MCL 722.27b(4), which states, in relevant part, as follows:

> All of the following apply to an action for grandparenting time under [MCL 722.27b(3)]:
>
> * * *
>
> (b) In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision *to deny grandparenting time* does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision *to deny grandparenting time* creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion. [Emphasis added.]

However, MCL 722.27b(1) provides:

> A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:
>
> (a) An action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court.
>
> (b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.
>
> (c) The child's parent who is a child of the grandparents is deceased.

> (d) The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013, by an order of filiation entered under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, or by a determination by a court of competent jurisdiction that the individual is the father of the child.[2]
>
> (e) Except as otherwise provided in [MCL 722.27b(13)], legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.
>
> (f) In the year preceding the commencement of an action under [MCL 722.27b(3)] for grandparenting time, the grandparent provided an established custodial environment for the child as described in [MCL 722.27], whether or not the grandparent had custody under a court order.

Nothing in MCL 722.27b(1), which sets forth when a grandparent may seek a grandparenting-time order, requires that there be a denial of grandparenting time before a grandparent may seek a grandparenting-time order. In the present case, Grandparents brought their motion for grandparenting time under MCL 722.27b(1)(d) and (f). Father has never disputed that, under MCL 722.27b(1)(d) and (f), Grandparents could seek an order for grandparenting time. Accordingly, under MCL 722.27b(1), Grandparents could seek an order of grandparenting time irrespective of whether Father had completely denied them all grandparenting time with A. Additionally, MCL 722.27b(4)(b) was included in the grandparenting-time statute so that the statute would no longer be constitutionally infirm. See

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[2] MCL 722.27b(2) prohibits a trial court from allowing the parent of a father who never married the child's mother from seeking an order for grandparenting time if the father's paternity has never been established.

Keenan, 275 Mich App at 678-679. To withstand a constitutional challenge under *Troxel* and *DeRose*, a grandparenting-time statute must require that a trial court give deference to a fit parent's decision regarding visitation between his or her child and the child's grandparent. See *DeRose*, 469 Mich at 332-334. The Legislature's intent in enacting MCL 722.27b(4)(b), then, was not to set forth requirements for when a grandparent could *seek* an order for grandparenting time (as it had already done in MCL 722.27b(1)), but merely to provide a scheme in which a parent's decision regarding visitation is given deference. This is the only logical conclusion when the grandparenting-time statute is read as a whole and when the historical context and development of MCL 722.27b(4)(b) are considered.

V. EXPERT TESTIMONY

Father argues that the trial court, upon concluding that the testimony of Grandparents' expert, psychologist Dr. Nancy Fishman, was not reliable, erred when it considered the statements that A made to Fishman as evidence. We disagree.

A trial court's decision regarding the admissibility of expert testimony is reviewed for an abuse of discretion, *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007), as are all the trial court's evidentiary decisions, *Taylor v Kent Radiology, PC*, 286 Mich App 490, 519; 780 NW2d 900 (2009). A trial court abuses its discretion if its decision results in an outcome outside the range of principled outcomes. *Surman*, 277 Mich App at 305.

MRE 702 provides:

> If the Court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

> witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under MRE 702, a trial court must act as a gatekeeper to ensure that all expert opinion testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 783; 685 NW2d 391 (2004). MRE 702 incorporates the standards of reliability that were described in *Daubert*[3] by the United States Supreme Court. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). Under *Daubert*, a trial court must ensure that all expert opinion testimony is relevant and reliable. *Id*. at 640. A trial court must determine the reliability of expert opinion testimony before the testimony may be admitted. *Tobin v Providence Hosp*, 244 Mich App 626, 647; 624 NW2d 548 (2001).

The trial court initially qualified Fishman as an expert, in accordance with MRE 702, and permitted her to testify as such. Fishman had been asked by Grandparents to offer an expert opinion regarding the effect on A if he was not allowed to see Grandparents. To reach an opinion, Fishman met with Grandparents and A on several occasions. In a later order, the trial court disqualified Fishman as an expert, finding that her methods and opinions did not meet *Daubert* standards and indicated that it would disregard Fishman's expert opinions.[4] Nonetheless, in finding that

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[3] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[4] Grandparents make no argument on appeal that the trial court erred by determining that Fishman's methods and opinions did not meet *Daubert* standards.

there would be a substantial risk of harm to A's mental and emotional health if grandparenting time were not granted, the trial court relied heavily on statements that A made to Fishman. In doing so, the court noted that Father had affirmatively waived any hearsay objection to A's statements made to Fishman, which Fishman testified regarding and were also contained in her report that had been admitted into evidence.

Many of A's statements to Fishman were hearsay; they were out-of-court statements used for the truth of the matter asserted. See MRE 801. Hearsay is not admissible unless it falls within an exception. MRE 802. There has never been a claim by Grandparents that any of A's statements to Fishman fell within a hearsay exception. As indicated by Grandparents, however, during the evidentiary hearing concerning Fishman's testimony, Father withdrew any hearsay objection to the admission of A's statements. In considering A's statements, the trial court relied on Father's withdrawal of the hearsay objection. Absent the withdrawal of such objection, many of A's statements would have been inadmissible.

Waiver is the voluntary and intentional relinquishment of a known right. *MacInnes v MacInnes*, 260 Mich App 280, 287; 677 NW2d 889 (2004). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation and quotation marks omitted). Father voluntarily and intentionally withdrew his hearsay objection to A's statements. Thus, Father cannot now argue on appeal that the trial court erred by considering A's statements because the statements were hearsay and did not fall

within a hearsay exception. Because Father withdrew his hearsay objection to A's statements, thereby allowing the facts and data on which Fishman based her opinion to be admitted into evidence, Father cannot now claim on appeal that the trial court erred when it considered A's statements.

VI. SUBSTANTIAL RISK OF HARM

Father avers that the trial court's finding that Grandparents proved that a denial of grandparenting time would create a substantial risk of harm was against the great weight of the evidence. We disagree.

As noted earlier, an order concerning grandparenting time may be reversed if the trial court's findings of fact were against the great weight of the evidence. *Keenan*, 275 Mich App at 679. A trial court's findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction. *Id*. at 679-680. A trial court has superior fact-finding ability, and this Court must give deference to a trial court's determination regarding the weight to assign evidence. See *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008).

We first note that the vast majority of Father's argument on this issue is premised on his prior argument—that the trial court erred by relying on A's statements to Fishman. Father makes no argument that, if A's statements to Fishman were properly considered, the trial court's finding was still against the great weight of the evidence. Given our conclusion that the trial court properly considered A's statements, we could simply affirm the trial court's factual finding regarding a substantial risk of harm without any analysis. However, thoroughness requires that we point out several salient portions of A's statements

to Fishman that showed, by a preponderance of the evidence, a denial of grandparenting time would create a substantial risk of harm to A's mental, physical, or emotional health.

A told Fishman that he feels as though he merely exists until the next time he gets to see his Grandparents and is very sad about losing his Grandparents. A stated that he had grown up referring to his Grandparents as "Mom" and "Pop" and that he felt as though he had lost the only home he had known. A stated that being required to live with his father made him feel like he had been kidnapped. A told Fishman that he is afraid of not being able to see his Grandparents; that sometimes he is homesick and lonely; that Grandparents' house feels like home and that is where he belongs and is most welcome; and that, if he could not see Grandparents anymore, his life would be horrible, he would be sad, angry, and depressed, and he would not have much to look forward to.

As previously stated, the evidence showed that A lived with his Grandparents for numerous years and that the Grandparents raised A as their own child. A's statements support that he saw his Grandparents as parental figures and certainly show that not only did he want to spend time with them, he would be angry, sad, and depressed if he could not. Under these circumstances, the evidence did not clearly preponderate against the trial court's finding that a denial of grandparenting time would create a substantial risk of harm to A's mental and emotional health. See *Keenan*, 275 Mich App at 680.

Affirmed.

RONAYNE KRAUSE, P.J., concurred with SERVITTO, J.

MURPHY, J. (*dissenting*). I conclude that defendant Peter Granneman (Father) was required to pursue his appeal by an application for leave and that he was not entitled to appeal the trial court's decision as of right. Therefore, I would dismiss Father's claims of appeal for lack of jurisdiction under MCR 7.203(A).[1] In my view, the clear intent of the Supreme Court in drafting MCR 7.202(6)(a)(iii) was to allow for an appeal of right solely with respect to postjudgment orders in domestic relations actions in which a court either granted a motion that effectively sought to change the legal or physical custody of a minor or denied such a motion. The Supreme Court did not intend to provide for an appeal of right in cases involving a postjudgment order in which a court ruled on a motion for or to modify grandparenting or parenting time, neither of which is mentioned in MCR 7.202(6)(a)(iii). In the simplest of terms relative to postjudgment proceedings, custody decisions are appealable of right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(iii), and grandparenting- and parenting-time decisions are appealable by applications for leave to appeal under MCR 7.203(B). Accordingly, I respectfully dissent.

"Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo." *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). We likewise review de novo, as a question of law, the proper interpretation and application of the court rules. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). In *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584,

[1] The Supreme Court's remand orders indicated, in part, that "[i]f the Court of Appeals determines that the . . . [trial court's] order[s] [are] not appealable by right, it may then dismiss . . . [Father's] claim[s] of appeal for lack of jurisdiction . . . ." *Varran v Granneman*, 497 Mich 928 (2014); *Varran v Granneman*, 497 Mich 929 (2014).

591; 735 NW2d 644 (2007), this Court set forth the governing principles concerning the construction of a court rule:

> The interpretation of court rules is governed by the rules of statutory interpretation. Court rules should be interpreted to effect the intent of the drafter, the Michigan Supreme Court. . . . Clear and unambiguous language is given its plain meaning and is enforced as written. But language that is facially ambiguous, so that reasonable minds could differ with respect to its meaning, is subject to judicial construction. [Citations and quotation marks omitted.]

MCR 7.203(A)(1) provides, in part, that this Court "has jurisdiction of an appeal of right filed by an aggrieved party" from "[a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." And MCR 7.202(6)(a)(iii) provides that a final judgment or order includes, "in a domestic relations action, a postjudgment order affecting the *custody* of a minor[.]"[2] (Emphasis added.)

In the context of family law, "custody" broadly means " '[t]he care, control, and maintenance of a child awarded by a court to a responsible adult.' " *In re AJR*, 496 Mich 346, 358; 852 NW2d 760 (2014) (citation omitted; alteration in original). In Michigan, two forms of custody are recognized—"physical" custody and "legal" custody. *Id*. at 359. "[T]he Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important

[2] I agree with the majority that neither of the postjudgment orders at issue qualify as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties" for purposes of MCR 7.202(6)(a)(i).

decisions affecting the child's welfare." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013), citing MCL 722.26a(7)(a) and (b); see also *In re AJR*, 496 Mich at 359.[3] In relationship to resolving custody disputes, a trial court may "[p]rovide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions." MCL 722.27(1)(b). "Visitation," as considered in the context of either parenting or grandparenting time, differs from custody and merely pertains to a person having a "period of access to a child," during which the person "is responsible for the care of the child . . . ." *Black's Law Dictionary* (7th ed); see also MCL 722.27 (custody and custody-related matters); MCL 722.27a (parenting time); MCL 722.27b (grandparenting time).

There is no dispute that a postjudgment order in a domestic relations action that actually changes the legal or physical custody of a minor constitutes an order "affecting the custody of a minor," giving rise to an appeal of right under MCR 7.202(6)(a)(iii). See *Wardell*, 297 Mich App at 131-133. In *Wardell*, this Court concluded that a postjudgment order that *denies* a motion for change of custody also qualifies as an order that affects the custody of a minor for purposes of MCR 7.202(6)(a)(iii). *Id*. at 133. The *Wardell* panel reasoned as follows:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial

[3] Legal custody concerns the authority to decide such matters as what school a child will attend or which doctor a child will visit for regular medical care. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011); *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 295-296; 750 NW2d 597 (2008).

> court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates,[4] a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [*Wardell*, 297 Mich App at 132-133 (alteration in original).]

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[4] There is also a history of this Court treating parenting-time decisions as appealable by application for leave. See, e.g., *Young v Punturo (On Reconsideration)*, 270 Mich App 553, 554; 718 NW2d 366 (2006) ("Plaintiff . . . appeals to this Court by leave granted the . . . order . . . which denied plaintiff's motion to dismiss a parenting time review pending in the circuit court.") (citation omitted); *Brown v Loveman*, 260 Mich App 576, 578; 680 NW2d 432 (2004) ("Plaintiff appeals by leave granted from the trial court's order adopting a parenting time schedule proposed by defendant . . . ."); *DeVormer v DeVormer*, 240 Mich App 601, 602; 618 NW2d 39 (2000) ("Defendant appeals by leave granted a circuit court order denying his motion for parenting time with his son . . . ."). Further, this Court has treated grandparenting-time decisions, arising out of motions and not independent complaints, as appealable by application for leave. See, e.g., *Book-Gilbert v Greenleaf*, 302 Mich App 538, 539; 840 NW2d 743 (2013) ("[T]he minor child's paternal grandmother appeals by leave granted the family court order denying her motion for grandparent visitation, MCL 722.27b.") (punctuation omitted); *In re Keast*, 278 Mich App 415, 417; 750 NW2d 643 (2008) (The foster care provider "appeals by leave granted an . . . order allowing the maternal grandparents of the children . . . visitation with the children."); *Bert v Bert*, 154 Mich App 208, 211; 397 NW2d 270 (1986) ("The validity of the trial court's actions in regard to the petition for grandparent visitation are now before this Court on leave granted.").

The *Wardell* decision did not address postjudgment orders regarding motions for, or to modify, parenting or grandparenting time. And the Court's discussion of the term "affecting" as used in MCR 7.202(6)(a)(iii) was limited to the framework of a physical custody decision or, in other words, "a trial court's ruling [that] necessarily has an effect on and influences where the child will live . . . ." *Id*. at 132.[5] In accordance with the conclusion reached in *Wardell*, I conclude that the Supreme Court employed the term "affecting" in MCR 7.202(6)(a)(iii) in order to ensure an appeal of right with respect to not only postjudgment orders actually changing the custody of a minor, but also postjudgment orders denying a motion to change custody. If the Supreme Court had intended to additionally allow for an appeal of right in regard to postjudgment parenting- or grandparenting-time orders, it certainly would have used language referring to "parenting time," "grandparenting time," or "visitation."

The trial court's order here did not have an effect on or influence where the child would live; therefore, it was not a postjudgment order affecting the physical custody of a minor for purposes of MCR 7.202(6)(a)(iii). An order that effectively determines the physical-custody arrangement or statuses of the parties, i.e., one that resolves whether a party will now have or continue having no physical custody, sole physical custody, or joint physical custody of a minor, would be an order truly having an effect on or influencing where

[5] The Court's examination of the issue in terms of whether an order affects where a child will "live" indicates that the panel was focused on physical custody and not legal custody. The *Wardell* parties had joint physical and legal custody, which remained in place after the trial court denied competing motions to change custody. *Wardell*, 297 Mich App at 129-130. It does not appear that the parties or the trial court in *Wardell* were concerned with legal-custody matters.

a minor will live. The entry of such an order was not even a remote possibility in the present case in light of the nature of the postjudgment motion that merely sought limited grandparenting time.

I next address this Court's opinion in *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013). In *Rains*, the parties had joint legal and physical custody of their minor child pursuant to a divorce judgment. The plaintiff subsequently filed a motion for change of domicile, seeking to move the child from the Detroit area to Traverse City. The plaintiff proposed an associated modification of the defendant's parenting time to every other weekend relative to the school year, constituting a significant reduction in the defendant's time with the child under the existing joint-custody arrangement. *Id*. at 315. The defendant argued that "the move would turn defendant into a 'weekend dad' instead of a full-time dad . . . ." *Id*. at 318-319. The defendant filed his own motion, requesting sole physical custody of the child. *Id*. at 315. The trial court denied the plaintiff's motion for change of domicile, modified the parenting-time schedule to a straight alternating-week format, and implicitly denied the defendant's motion to change custody. *Id*. at 319, 323. The plaintiff filed an appeal of right, and the defendant argued "that the appeal should be dismissed for lack of jurisdiction because the trial court's order denying plaintiff's motion for change of domicile was not a final order appealable as of right." *Id*. at 319-320.

Referring to and quoting the *Wardell* opinion, the *Rains* panel stated that "we must ask whether the trial court's order denying plaintiff's motion for a change of domicile 'influences where the child will live,' regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.' " *Rains*, 301 Mich App at

321, citing and quoting *Wardell*, 297 Mich App at 132-133. The Court noted that, "[u]nder *Wardell*, a trial court need not change a custodial arrangement in order for its decision to affect custody." *Rains*, 301 Mich App at 323.[6] The Court further stated and held:

> Plaintiff had hoped to move the child to Traverse City, where he would reside primarily with her and see defendant every other weekend. The trial court's decision not to allow such a move to take place necessarily influenced where the child would live. Therefore, the fact that the parties were left in status quo as a result of the trial court's order is not dispositive.
>
> Further, as in *Thurston* [*v Escamilla*, 469 Mich 1009 (2004)] and as further discussed below, the parties in this case enjoyed joint legal and physical custody of the child and there was an established joint custodial environment with both parents. If a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment. Therefore, we conclude that plaintiff has properly invoked appellate jurisdiction as of right. *Wardell* has provided an expansive definition of "affecting the custody of a minor." Additionally, in *Thurston* our Supreme Court indicated that an order on a motion for change of domicile that could affect an established joint custodial environment is appealable by right. [*Rains*, 301 Mich App at 323-324 (citations omitted).][7]

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[6] To be clear, the Court in *Wardell* made the observation later referred to by the panel in *Rains* in the context of determining whether the *denial of a motion to change custody* affected the custody of a minor; the *Wardell* Court was not speaking in general terms about a decision resolving any motion in a domestic relations action, but rather a custody-based motion.

[7] I note that both the *Wardell* and *Rains* panels included a footnote indicating that even if they had determined that the orders were not appealable of right, they would have nevertheless, in the exercise of their discretion and the interest of judicial economy, treated the claims of appeal as applications for leave, granted leave, and then proceeded to address the substantive issues. *Rains*, 301 Mich App at 320 n 2; *Wardell*,

As reflected in this passage, the *Rains* panel concluded that the plaintiff was entitled to an appeal of right because the trial court's order on the plaintiff's motion to change domicile influenced where the child would live and because the prospective change in domicile would have substantially reduced the defendant's time with the child, potentially causing a change in the established custodial environment. I note that *Rains*, like *Wardell*, was focused on physical custody. The unremarkable principle that emanates from *Rains* is that while a motion may be framed as one seeking a change of domicile, if granting the motion would effectively result in a change of custody or the established custodial environment, the trial court's postjudgment order either granting or denying the motion is appealable of right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(iii).[8] The same can be said when a parent or grandparent files a motion for, or to modify, parenting or grandparenting time, if indeed the nature of the request is such that granting the motion would effectively award custody to a party or alter the custodial arrangement or environment.[9] See *Stevens v Stevens*,

297 Mich App at 133 n 1. An argument can be made that the substantive analysis and statements on jurisdiction were rendered nonbinding obiter dicta given the inclusion of these footnotes. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, 'lack the force of an adjudication.' ") (citation omitted).

[8] I do appreciate that an "established custodial environment" may differ from a specific custody award set forth in an order, e.g., there can be an order of joint physical custody, yet the established custodial environment could be with just one of the parents. See MCL 722.27(1)(c); *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008).

[9] Of course, if a grandparent effectively seeks custody, it would be necessary for the grandparent to satisfy the criteria in MCL 722.26c regarding actions for custody by third persons.

86 Mich App 258, 270; 273 NW2d 490 (1978) ("When the requested [visitation] modification amounts to a change in the established custodial environment, the trial court should not grant such a modification unless it is persuaded by clear and convincing evidence that the change would be in the best interests of the child.").

Once again, the trial court's postjudgment order here did not influence where the minor child would live, and the order did not change, either directly or effectively, the legal or physical custody arrangement; Father retained sole legal and physical custody of the child. And the postjudgment motion for grandparenting time did not request, either directly or effectively, a change of legal or physical custody relative to the child, so such a change was not even a possibility.

The Supreme Court's order in *Thurston*, 469 Mich 1009, which was referred to in *Rains*, does not add much to the analysis, in that it essentially mirrors *Rains*. The *Thurston* order provided:

> In lieu of granting leave to appeal, the . . . order of the Court of Appeals is vacated, and the case is remanded to that Court for plenary consideration. MCR 7.302(G)(1). The divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children. The . . . order of the Saginaw Circuit Court granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the State of New York, the order is one *affecting* the custody of a minor . . . . Therefore, the . . . order is final, and appealable by right. [*Thurston*, 469 Mich 1009 (quotation marks omitted).]

Despite the failure of the plaintiff in *Thurston* to frame the motion as one that also sought a change of custody, an appeal of right still arose because the trial

court's order allowing the change of domicile to New York *effectively* changed the custody arrangement. In no way do *Thurston* or *Rains* suggest that *any and all* postjudgment orders on motions for change of domicile are appealable of right; it is only when a domicile motion has the potential of effectively changing custody or the established custodial environment that an appeal of right is provided. The majority posits that "[i]n *Thurston*, . . . despite the fact that the trial court's order that granted the mother's motion for change in domicile did not alter the award of joint legal and physical custody, the Supreme Court still held that the order was one affecting the custody of a minor." While the short order in *Thurston* may not be entirely clear, I conclude, contrary to the majority's construction of the order, that the *Thurston* Court held that the order changing domicile effectively altered custody. I reach this conclusion given the Court's references to the existing "joint" custody award, the "joint" custodial environment, the failure of the plaintiff to "mention *a change of custody*," and the fact that the defendant had nearly daily contact with the children before the change of domicile. *Thurston*, 469 Mich 1009 (emphasis added). Considering that the *Thurston* plaintiff was moving to New York State, it is doubtful that the existing custody award was not effectively changed.[10]

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[10] I note that a similar situation was recently addressed in *Sulaica v Rometty*, 308 Mich App 568, 576; 866 NW2d 838 (2014), wherein this Court, after reviewing *Rains*, *Wardell*, and *Thurston* held, consistently with my analysis, as follows with respect to a jurisdictional challenge under MCR 7.202(6)(a)(iii):

> In this case [involving an underlying order of joint physical custody], the trial court's orders affected the child's domicile *and substantially reduced the amount of time plaintiff can spend with the child as a result of the child's move from Michigan to Florida*. Accordingly, we find that both of the orders from which plaintiff

As stated earlier, in this case Father's sole legal and physical custody of the child was not subject to possible divestment or alteration in the lower court proceedings in this case.

The crux of the majority's position on the issue regarding whether Father has an appeal of right is as follows:

> A parent has a fundamental right, one that is protected by the Due Process Clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of his or her child. It cannot be disputed that a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child. Although a parent has denied grandparenting time, a grandparent may obtain an order for grandparenting time if the grandparent proves by a preponderance of the evidence that the denial of grandparenting time will create a substantial risk of harm to the child and if the trial court finds by a preponderance of the evidence that a grandparenting-time order is in the child's best interests. Because a grandparenting-time order overrides a parent's legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. Thus, when a parent has legal custody of the child, an order regarding grandparenting time is a postjudgment order affecting the custody of a minor. MCR 7.202(6)(a)(iii). Because Father had legal custody of [the child], we hold that the . . . order was a "final judgment" or "final order" under MCR 7.202(6)(a)(iii) and, therefore, appealable by right, MCR 7.203(A)(1). [Citations omitted.]

I fully agree with the majority that a parent has a fundamental constitutional right, under due process

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appeals were orders "affecting the custody of a minor" and that they are appealable as of right. [Citations omitted; emphasis added.]

principles, to make decisions regarding the care, custody, and control of his or her child, and that right has heightened protection from governmental interference. *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014). If I understand its analysis correctly, the majority is concluding that a grandparenting-time order entered against a parent's wishes interferes with or affects the parent's fundamental constitutional right to make decisions regarding the care of his or her child, which equates to interfering with or affecting the parent's legal custody for purposes of MCR 7.202(6)(a)(iii). Because "legal" custody "is understood to mean decision-making authority as to important decisions affecting [a] child's welfare," *Grange Ins Co*, 494 Mich at 511, the majority is necessarily of the view that the decision of a parent to disallow grandparenting time constitutes an important decision affecting a child's welfare. Therefore, under the majority's reasoning, the postjudgment order here affected Father's legal custody of the child, i.e., his decision-making authority, considering that the order awarded grandparenting time contrary to his decision on the matter.[11] I surmise that part of the majority's logic in deciding that a postjudgment, grandparenting-time order is one affecting constitutional rights and legal custody is grounded in the fact that a grandparent is an outside or third party, not simply an opposing parent.

I respectfully disagree with the majority's analysis, because it reflects an overly broad construction of MCR 7.202(6)(a)(iii) that is not consistent with the language of the court rule, thereby undermining our Supreme

[11] Although not expressly discussed by the majority, it would appear, given the majority's analysis and reasoning and its acceptance of the principles in *Wardell* and *Rains*, that it would have allowed Debora and James Granneman an appeal of right had the trial court denied their motion for grandparenting time.

Court's intent. It is well accepted and beyond reasonable dispute that there are three custodial classifications related to both the physical and legal custody of a child—(1) no custody, (2) sole custody, and (3) joint custody. See MCL 722.27(1)(a) (stating that a court may "[a]ward the custody of the child to 1 or more of the parties involved"); MCL 722.26a (concerning joint custody). Keeping this in mind, when MCR 7.202(6)(a)(iii) speaks of a postjudgment order "affecting the custody of a minor," it is necessarily concerned solely with orders that address motions that had effectively sought to change custody, because the *custody* of a minor would not be *affected* in deciding motions unrelated to altering a custodial classification and arrangement. If a parent has sole legal custody, and a motion is filed for straightforward parenting or grandparenting time, the postjudgment order resolving the motion cannot be an order "affecting the custody of a minor" under MCR 7.202(6)(a)(iii). This is true given that "custody" was not in dispute and could only have been affected had a possibility existed that the parent's sole legal custody would be modified in a manner that left the parent with "no" or "joint" legal custody. When, in light of the nature of a motion filed by a party, a postjudgment dispute will definitively result in no change of custody, as between the three recognized custodial classifications, the ultimate order will simply never affect custody.

The majority is advocating in favor of an appeal of right, not with respect to postjudgment orders affecting custody as set forth in MCR 7.202(6)(a)(iii), but in regard to postjudgment orders affecting the exercise of custodial rights, affecting the parameters of earlier custody awards, or affecting decisions made in relationship to having custody of a child, *which do not reach the level of potentially changing custody, i.e., affecting the custody of a child*. The majority's reason-

ing thus opens a Pandora's box for litigants to argue that an appeal of right exists in cases intended to be appealable only by application for leave, merely because custody-related rights, parameters, and decisions, but not custody changes, were litigated.[12] While the postjudgment order in this case may have affected or interfered with Father's decision to disallow grandparenting time, it did not affect or potentially affect his legal custody of the minor. Father retained sole legal custody of his child, and he was never in danger of losing sole legal custody.

Again, MCR 7.202(6)(a)(iii) only mentions custody; it does not refer to parenting time, grandparenting time, or visitation. Therefore, I am convinced that our Supreme Court did not intend to extend appeals of right to postjudgment visitation orders or any other orders that did not address efforts to change custody.[13] In sum, I conclude, in the simplest of terms, that postjudgment custody decisions are appealable of right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(iii), and that postjudgment grandparenting- and parenting-time decisions are appealable by applications for leave to appeal under MCR 7.203(B). I would therefore dismiss Father's appeal for lack of jurisdiction under MCR 7.203(A). Accordingly, I respectfully dissent.

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[12] Under the majority's analysis, any and all subsequent motions regarding any type of modification to the existing grandparenting-time award will be appealable of right.

[13] The majority's opinion could be interpreted as suggesting that had this case simply involved a parent seeking parenting time, an application for leave would have been required. I am not prepared to recognize a dichotomy wherein grandparents seeking grandparenting time have an appeal of right if their postjudgment motion is denied, but the only avenue for relief as to a parent who is denied a request for parenting time is an application for leave. This would improperly elevate the appellate rights of grandparents relative to a minor over the rights of the minor's parents.

FRANCESCUTTI v FOX CHASE CONDOMINIUM ASSOCIATION

Docket No. 323111. Submitted October 1, 2015, at Detroit. Decided October 15, 2015, at 9:00 a.m.

Michael J. Francescutti brought an action in the Macomb Circuit Court against Fox Chase Condominium Association after he slipped and fell on an icy, snow-covered sidewalk in a common area of the condominium development at which he co-owned a condominium. Plaintiff severely injured his hand and wrist as a result of the fall. Plaintiff alleged negligence and breach of contract, and defendant moved for summary disposition. The court, James M. Biernat, Jr., J., treated plaintiff's claim as naming premises liability as the basis for relief, and the court granted defendant's motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. A condominium owner is a tenant in common with other condominium owners for purposes of the common areas of a condominium development. However, use of "tenant in common" to describe plaintiff's relationship with the common areas of his condominium development does not transform plaintiff into a "tenant," as that term is understood. That is, plaintiff's status as a tenant in common does not make defendant a "lessor" for purposes of MCL 554.139, the statute requiring a lessor to maintain its property in reasonable repair.

2. Defendant owed no duty to plaintiff under the principles of premises liability because plaintiff was neither an invitee nor a licensee for purposes of those principles; plaintiff was a co-owner of the common areas of the condominium development where he was injured.

3. Plaintiff's breach of contract claim fails because he cannot identify any contractual language giving rise to a duty somehow breached by defendant from which plaintiff's injuries arose. Defendant's snow removal policy was not a contract between the parties that placed some duty on defendant to protect plaintiff from injury in the common areas of the condominium development.

Affirmed.

PROPERTY — CONDOMINIUMS — PREMISES LIABILITY — STATUS OF A CONDOMINIUM OWNER.

A condominium owner is a tenant in common with the other condominium owners of the common areas of a condominium development; the owner of a condominium is not an invitee or licensee for purposes of a premises liability claim for injuries that occurred in a common area of the condominium development.

Lippitt O'Keefe Gornbein, PLLC (by *Daniel J. McCarthy*), for plaintiff.

Bowen, Radabaugh & Milton, PC (by *Thomas R. Bowen* and *Mary Rourke Benedetto*), for defendant.

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

SAWYER, J. Plaintiff appeals from the trial court's order granting summary disposition to defendant Fox Chase Condominium Association on plaintiff's slip-and-fall claim.[1] We affirm.

Plaintiff, a professional magician, is the co-owner of a condominium unit in defendant's Fox Chase development. One evening in February 2013 at approximately 11:00 p.m., plaintiff was walking his dog when he slipped and fell on an icy, snow-covered sidewalk located in a common area of the development. Plaintiff alleges that as a result of the fall, he suffered severe injuries to his hand and wrist, causing severe pain and suffering and interfering with his ability to work as a magician. Plaintiff filed this action alleging negligence and breach of contract. Defendant moved for summary disposition, arguing that the open and obvious danger

[1] Defendant Fox Chase is the condominium association formed under the Condominium Act, MCL 559.101 *et seq*., while defendant Association Management, Inc. (AMI), is the management company hired by defendant Fox Chase to manage the Fox Chase complex. The claims against defendant AMI were previously dismissed by stipulation of the parties. Accordingly, we shall refer to a singular defendant, Fox Chase.

doctrine precluded the negligence claim, and that there was no contractual duty to remove the snow and ice from the common areas on which plaintiff could base a contract claim. The trial court agreed and granted defendant's motion for summary disposition.

Plaintiff first argues that the trial court erred in dismissing the negligence claim because defendant had a duty under MCL 554.139 to maintain the property in reasonable repair. We disagree. MCL 554.139 imposes such a duty on the lessor of land. Defendant is not a lessor of land leased to plaintiff. Plaintiff co-owns a condominium unit in the Fox Chase condominium development. Plaintiff attempts to employ a semantic sleight of hand by noting that under MCL 559.136 of the Michigan Condominium Act, he is a tenant in common of the common areas of the development. And because that makes him a "tenant," plaintiff posits that that makes defendant a "lessor" of the land. It, of course, does no such thing. Defendant does not lease the common areas to plaintiff under a lease, and therefore, defendant is not a "lessor" under MCL 554.139. That statute is not applicable to this case.

Next, we turn to plaintiff's argument that the trial court improperly dismissed his claim that defendant was negligent for failing to exercise ordinary care. Notably, the trial court treated plaintiff's negligence claim as one of premises liability rather than general negligence. Plaintiff begins by agreeing with the trial court that his status was one of invitee and then discusses the duty owed to an invitee. Defendant, on the other hand, argues that plaintiff should be considered a licensee, to whom a lesser duty is owed. But neither the parties nor the trial court provide any authority for the proposition that the status of an owner of a condominium unit is either an invitee or a

licensee with respect to the common areas of the development. Nor were we able to find any such authority. But this question can easily be resolved by looking at the definitions of those terms. "A 'licensee' is a person who is privileged to enter *the land of another* by virtue of the possessor's consent," while "[a]n 'invitee' is 'a person who enters upon *the land of another* upon an invitation . . . .' "[2]

The key to the resolution of this case is the phrase in both definitions, "the land of another." Plaintiff did not enter on "the land of another." Plaintiff is, by his own admission, a co-owner of the common areas of the development. Plaintiff's brief acknowledges that the condominium owners are co-owners as tenants in common of the common areas of the development. And because plaintiff is neither a licensee nor an invitee, there was no duty owed to plaintiff by defendant under premises liability. Rather, any duty owed to plaintiff by defendant must arise either from principles of general negligence or breach of contract.

As for a general negligence claim, while plaintiff's complaint merely labeled his claim as one of "negligence," rather than specifically one of premises liability, the trial court concluded that the substance of the allegations sounded in premises liability. And in reading the complaint, we agree. In any event, plaintiff's arguments on appeal focus on his misplaced statutory analysis as well as the trial court's premises liability analysis, and in particular, the applicability of the open and obvious doctrine in this case. Plaintiff does not make out an argument under general negligence. That is, although calling his claim one of general negligence,

[2] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), quoting *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987) (emphasis added).

plaintiff only argues the claim, with the exception of the alleged statutory violation, in the context of premises liability.

Turning to the other basis for plaintiff's claim that defendant owed a duty to him, plaintiff did plead a breach of contract claim against defendant. The trial court granted summary disposition in favor of defendant on the contract claim because plaintiff failed to identify any specific contractual language in support of his breach of contract claim. Indeed, the trial court stated that plaintiff's contract claim was "nothing more than a restatement of his premises liability claim." Plaintiff continues this shortcoming on appeal. Plaintiff directs us to no contract language that would establish a contractual duty, and thus, plaintiff can show no breach of duty. Plaintiff only points to a document that defendant sent out regarding its snow removal policy. Plaintiff cannot produce a contract that actually creates a duty, much less provide any evidence that any such duty was breached. In fact, given plaintiff's cursory treatment, it is not at all apparent that plaintiff has pursued this issue on appeal. That is, it would be reasonable to conclude that plaintiff has abandoned that issue. In any event, the trial court properly dismissed the breach of contract claim.

Affirmed. Defendant may tax costs.

GLEICHER, P.J., and MURPHY, J., concurred with SAWYER, J.

PEOPLE v TUCKER

Docket No. 322151. Submitted July 7, 2015, at Detroit. Decided October 15, 2015, at 9:05 a.m. Leave to appeal sought.

Anthony Gestail Tucker pleaded no contest in the Oakland Circuit Court to felonious assault and misdemeanor domestic violence. At sentencing the court, Rae Lee Chabot, J., informed defendant he was required to register as a sex offender because of the recapture provision, MCL 28.723(1)(e), in the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The recapture provision requires a defendant to register under SORA when he or she is convicted of a felony offense on or after July 1, 2011, if the defendant was previously convicted of a listed offense for which he or she was not required to register. In this case, when defendant was convicted of felonious assault in 2013, the recapture provision in SORA applied to defendant's 1990 conviction of assault with intent to commit criminal sexual conduct involving penetration because the 1990 crime was a listed offense. SORA had not yet been enacted at the time of defendant's 1990 conviction, so defendant was not required to register. Defendant filed a motion to correct an invalid sentence to have himself removed from the sex offender registry. He argued that requiring him to register under SORA violated the Ex Post Facto Clauses of the federal and state constitutions. Defendant also argued that SORA's provisions—specifically, the in-person reporting requirements and the restrictions created by student safety zones—violated the Cruel and Unusual Punishment Clause of the federal Constitution and the Cruel or Unusual Punishment Clause of the state Constitution. The court denied defendant's motion. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. The recapture provision in SORA does not violate the Ex Post Facto Clauses of the federal or state constitutions. The recapture provision did not change the penalty for defendant's 1990 conviction of sexual assault. In fact, the recapture provision had no effect at all on the previous conviction. The recapture provision attached consequences to defendant's 2013 felony conviction because of the 1990 conviction, but it did not increase the

penalty for the 1990 conviction, it did not allow for conviction on less evidence, it did not criminalize conduct that was not criminal at the time it was committed, and it did not make the offense more serious. In this case, the recapture provision enhanced the penalty for his 2013 felony conviction because of the 1990 conviction, but the recapture provision did not in any way disturb the penalty for the 1990 conviction.

2. Compliance with SORA's in-person reporting requirements and the prohibitions related to student safety zones does not constitute punishment. Whether a statute imposes punishment requires the reviewing court to conduct a two-step inquiry into the statute's content. First, the reviewing court must determine whether the language and structure of the statute indicate that the Legislature intended the statute to be a punishment or a civil remedy. Second, if the Legislature intended to enact a civil remedy, the reviewing court must determine whether the consequences of the statute are so punitive in purpose or effect as to negate the Legislature's intent to create a civil remedy. In this case, there was no dispute that the Legislature intended SORA to be a civil remedy. Defendant argued, however, that complying with SORA requirements concerning student safety zones and in-person reporting was so punitive in purpose or effect that it negated the civil purpose intended by the Legislature. To determine whether a statutory scheme is so punitive in purpose or effect that it results in punishment requires an examination of seven factors enunciated in *Kennedy v Mendoza-Martinez*, 372 US 144 (1963).

3. Requiring a defendant to comply with SORA's in-person reporting requirements and SORA's prohibitions related to student safety zones does not constitute punishment. The seven factors in *Mendoza-Martinez* are (1) whether a sanction imposed by the statute involves an affirmative disability or restraint, (2) whether the sanction has historically been regarded as a punishment, (3) whether the sanction requires scienter, (4) whether the sanction promotes retribution and deterrence, (5) whether the sanction applies to conduct that is already a crime, (6) whether the sanction can be assigned to a rationally connected alternative purpose, and (7) whether the sanction is excessive compared to the alternative purpose. After the Court's review of five of the seven factors in *Mendoza-Martinez* (the Court did not examine the role of scienter or the relationship between SORA registration and criminal conduct), the Court concluded that although a few of the factors weighed toward finding that SORA requirements constituted punishment, the majority of factors

did not. Because the Legislature clearly intended SORA to provide the civil remedy of protecting the welfare of the general public from the danger posed by convicted sex offenders, and because the factors in *Mendoza-Martinez* did not favor a finding of punishment, the Court held that SORA did not constitute punishment and could not, therefore, constitute cruel or unusual punishment.

4. Compliance with the prohibitions related to student safety zones and the requirements of in-person reporting results in an affirmative disability or restraint under the first factor of *Mendoza-Martinez*. Therefore, this factor weighs in favor of finding that compliance with SORA's student safety zone prohibitions and in-person reporting is punishment. However, other factors weigh more heavily against finding that in-person reporting and the restrictions related to student safety zones are punishment.

5. The prohibition against living, working, or loitering in a student safety zone resembles the historical punishment known as banishment, and the demands of in-person reporting are comparable to the conditions of supervised probation or parole. This *Mendoza-Martinez* factor weighs in favor of finding that compliance with SORA compares with practices historically considered punishments. However, factors in favor of finding that SORA requirements constitute a civil remedy outweigh the factors in favor of finding that SORA requirements constitute punishment.

6. Although the foremost purpose of student safety zones is deterrence, a traditional aim of punishment, student safety zones do not promote retribution. And to the extent that SORA's reporting requirements constitute punishment, the requirements do not promote deterrence or retribution.

7. Student safety zones and in-person reporting bear a rational connection to the nonpunitive purpose of protecting the public's welfare.

8. The Legislature is authorized to enact statutes that categorically apply to sex offenders without regard to the individual circumstances of the offender or the offense. Therefore, that the prohibition against living in a student safety zone applies to offenders whose crimes did not involve children does not make the restrictions imposed by student safety zones excessive. Nor are the onerous in-person reporting requirements excessive. The reporting requirements are reasonably designed to ensure that the information on the registry is accurate and up-to-date.

Affirmed.

1. SEX OFFENDERS REGISTRATION ACT — CONSTITUTIONALITY — REPORTING REQUIREMENTS.

In-person reporting, with the required frequency and for the length of time determined by the offense of which a defendant was convicted, does not constitute a punishment; the express purpose of the Sex Offenders Registration Act (SORA) is to protect public safety and the reporting requirements are not so punitive in either purpose or effect so as to negate the civil purpose of SORA; although in-person reporting requirements impose affirmative restraints and resemble conditions of supervised probation or parole, the reporting requirements do not necessarily promote deterrence or retribution, are not excessive, and are rationally related to the nonpunitive purpose of protecting the public by ensuring that the sex offender registry is accurate and up-to-date; because SORA reporting requirements, while burdensome, do not constitute punishment, the requirements cannot constitute cruel or unusual punishment.

2. SEX OFFENDERS REGISTRATION ACT — CONSTITUTIONALITY — STUDENT SAFETY ZONES.

The prohibitions found in the Sex Offenders Registration Act (SORA) provisions regarding student safety zones are not so punitive in purpose or effect as to negate the Legislature's stated intent that SORA protect the public safety; although student safety zones impose affirmative restraints, resemble historical punishments, and promote deterrence, they are not excessive, and they are rationally connected to the nonpunitive purpose of public safety; the Legislature is authorized to enact a statutory scheme that categorically prohibits all sex offenders from living, working, or loitering near school property; the statutory law regarding student safety zones applies to all sex offenders under SORA, and no individualized determination of the future danger an offender might pose is necessary; because student safety zones do not constitute punishment, enforcement of the proscriptions related to student safety zones does not constitute cruel or unusual punishment.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Tanya L. Nava*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jessica L. Zimbelman*) for defendant.

Amicus Curiae:

Sofia V. Nelson, *Miriam J. Aukerman*, and *Kary L. Moss* for the American Civil Liberties Union.

Before: HOEKSTRA, P.J., and JANSEN and METER, JJ.

PER CURIAM. Defendant appeals by delayed leave granted[1] his no-contest plea convictions of felonious assault, MCL 750.82, and domestic violence, MCL 750.81(2). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 119 days, time served, for the felonious assault conviction, and 93 days, time served, for the domestic violence conviction. Defendant was also required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We affirm.

I. BACKGROUND

Defendant was convicted in 1990 of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). He was sentenced to three years' probation and was discharged in 1993. On October 1, 1995, SORA went into effect. See 1994 PA 295. Although assault with intent to commit criminal sexual conduct involving penetration is a listed offense requiring registration, MCL 28.722(w)(*iv*), defendant was not required to register because he was discharged from probation before the registry went into effect, MCL 28.723(1). In 2011, the Legislature amended

[1] See *People v Tucker*, unpublished order of the Court of Appeals, entered July 3, 2014 (Docket No. 322151).

SORA, 2011 PA 17, to include the following "recapture" provision, codified at MCL 28.723(1)(e):

> (1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:
>
> * * *
>
> (e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

On October 8, 2013, defendant pleaded no contest to felonious assault, MCL 750.82, and domestic violence, MCL 750.81(2), under a *Cobbs*[2] agreement by which he would be sentenced to time served. At sentencing, the trial court told defendant that he would be required to register as a sex offender under MCL 28.723(1)(e)[3] and gave defendant the opportunity to withdraw his plea. Defendant declined. Defendant was required to register for life as a Tier III offender.

Defendant then filed a motion to correct an invalid sentence to have himself removed from the SORA registry, arguing that the registration requirement violated the state and federal Ex Post Facto Clauses, the federal Cruel and Unusual Punishment Clause, and the state Cruel or Unusual Punishment Clause. The trial court denied the motion and determined that defendant was required to register under the terms of SORA.

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[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[3] Defendant was required to register under MCL 28.723(1)(e) because of his felonious assault conviction, which is a felony. See MCL 750.82(1). His domestic violence conviction is a misdemeanor. MCL 750.81(2).

II. EX POST FACTO CLAUSES

Defendant first contends that the requirement that he register as a sex offender under SORA violates the Ex Post Facto Clauses of the state and federal constitutions. We disagree.

We review de novo issues of constitutional law. *People v Temelkoski*, 307 Mich App 241, 246; 859 NW2d 743 (2014), lv gtd 498 Mich 942 (2015). The United States and Michigan Constitutions prohibit ex post facto laws. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003), citing US Const, art I, § 10; Const 1963, art 1, § 10. This Court has declined to interpret the Ex Post Facto Clause of the Michigan Constitution as affording broader protection than its federal counterpart. *Callon*, 256 Mich App at 317. All laws that violate ex post facto protections exhibit the same two elements: "(1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id*. at 318. "The critical question [for an *ex post facto* violation] is whether the law changes the legal consequences of acts completed before its effective date." *Id*. (quotation marks and citations omitted; alteration in original). This Court has identified four circumstances that implicate the Ex Post Facto Clauses:

> A statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).]

In this case, the third circumstance is at issue. Defendant argues that his registration as a sex offender has

increased the punishment for his 1990 conviction. The prosecution counters that MCL 28.723(1)(e) cannot constitute an ex post facto law because it attaches legal consequences to defendant's 2013 felony conviction, not his 1990 conviction.

We find caselaw on recidivist statutes helpful in answering this question. As a general matter, " 'recidivist statutes . . . do not change the penalty imposed for the earlier conviction.' " *People v Reichenbach*, 459 Mich 109, 124-125; 587 NW2d 1 (1998), quoting *Nichols v United States*, 511 US 738, 747; 114 S Ct 1921; 128 L Ed 2d 745 (1994). *Callon* is instructive. The defendant in *Callon* was convicted of impaired driving, MCL 257.625(3), in 1993. *Callon*, 256 Mich App at 315. On October 9, 1999, he was arrested for "operating a vehicle under the influence of intoxicating liquor or while having a blood alcohol content of 0.10 grams or more per 100 milliliters of blood (OUIL/UBAL), MCL 257.625(1)." *Callon*, 256 Mich App at 314. During the period between the two offenses, the Legislature amended MCL 257.625(23)(a) so that a previous impaired-driving conviction could be used to enhance a subsequent OUIL/UBAL conviction. *Id*. at 315-316. This Court rejected the defendant's ex post facto challenge to this enhancement, holding that the amendment to the statute had not altered the legal consequences of his 1993 conviction, but rather, it altered the legal consequences of his 1999 conviction. *Id*. at 318. This Court explained, "[T]he conduct for which defendant is being punished is driving while intoxicated or with an unlawful blood alcohol level after having fair notice that the statute had been amended to permit enhancement of an OUIL/UBAL conviction with a prior impaired-driving conviction." *Id*. at 319. This Court concluded, "Simply put, there is no retroactive application of the law where a prior conviction is

used to enhance the penalty for a new offense committed after the effective date of the statute." *Id*. at 321.

In this case, although MCL 28.723(1)(e) is not a traditional recidivist statute, the reasoning of *Callon* applies nonetheless. Defendant's registration was not required until he committed another felony in 2013. His 1990 conviction was used to enhance the consequences of his 2013 felony, which was committed after the effective date of the statute. This would be a different case if on July 1, 2011, the effective date of MCL 28.723(1)(e), defendant had been immediately required to register as a sex offender because of his 1990 conviction alone. Rather, defendant is required to register in connection with the 2013 felony. Defendant's registration in this case is inextricably tied to his 1990 conviction, but this does not lead to the conclusion that new legal consequences have been added to that conviction. In *Callon*, the enhancement was similarly tied to the defendant's preceding impaired-driving conviction, but the consequences were added to his subsequent OUIL/UBAL offense. See *Callon*, 256 Mich App at 318. Therefore, the recapture provision found in MCL 28.723(1)(e) does not violate the Ex Post Facto Clauses of the state and federal constitutions.[4]

III. CRUEL OR UNUSUAL PUNISHMENT

Defendant next argues that requiring him to register as a sex offender constitutes cruel or unusual punishment. We disagree.

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[4] Amicus curiae American Civil Liberties Union argues that defendant's registration as a sex offender violates the Ex Post Facto Clauses as applied to him. However, the United States Supreme Court has held that ex post facto challenges cannot be brought on an as-applied basis. *Seling v Young*, 531 US 250, 263; 121 S Ct 727; 148 L Ed 2d 734 (2001). Therefore, we reject this argument.

As stated, we review de novo issues of constitutional law. *Temelkoski*, 307 Mich App at 246. Defendant, as the party challenging his SORA registration, bears the burden of proving that it is unconstitutional. *Id*. at 247.

Article 1, § 16 of the Michigan Constitution prohibits the infliction of cruel or unusual punishment.[5] The threshold question in this case is whether registration constitutes punishment at all. See *Temelkoski*, 307 Mich App at 250-251. We have repeatedly held that sex offender registration does not constitute punishment because the registry is designed to protect the public rather than punish the offender. *Id*. at 250-271; *People v Golba*, 273 Mich App 603, 615-621; 729 NW2d 916 (2007); *People v Pennington*, 240 Mich App 188, 191-197; 610 NW2d 608 (2000).[6] But defendant posits an

[5] The Eighth Amendment of the United States Constitution prohibits the infliction of cruel *and* unusual punishment. US Const, Am VIII. The equivalent state constitutional provision is interpreted more broadly than the federal provision, and therefore, if a particular punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

[6] One exception was *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009). In that case, the defendant, aged 18, had a consensual sexual relationship with NT, "who was nearly 15 years old." *Id*. at 140. NT's parents "knew of the relationship and condoned it." *Id*. at 154. The defendant and NT subsequently married. *Id*. The defendant pleaded guilty to attempted third-degree criminal sexual conduct, MCL 750.92; MCL 750.520d(1)(a), and was placed on youthful trainee status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., on August 29, 2004. *Dipiazza*, 286 Mich App at 140. Under SORA, as it existed at that time, the defendant was required to register as a sex offender. *Id*. However, amendments to SORA went into effect on October 1, 2004, and if the defendant had been placed on HYTA status on or after October 1, 2004, he would not have been required to register as a sex offender. *Id*. at 141. The defendant was successfully discharged from HYTA status, and he petitioned to be removed from the sex offender registry. *Id*. at 140. This Court held that the defendant's registration as a sex offender constituted cruel or unusual punishment as applied to him. *Id*. at 156.

argument we have not yet addressed. He argues that sex offender registration constitutes punishment because of the 2011 amendments that added to the SORA registration requirements. He specifically draws our attention to student safety zones and in-person reporting requirements. We take this opportunity to address the constitutionality of these provisions.

A. HISTORY OF SORA

SORA first went into effect on October 1, 1995. 1994 PA 295; *People v Dipiazza*, 286 Mich App 137, 142; 778 NW2d 264 (2009). It has since been amended 20 times. See 2014 PA 328; 2013 PA 2; 2013 PA 149; 2011 PA 17; 2011 PA 18; 2006 PA 46; 2006 PA 402; 2005 PA 121; 2005 PA 123; 2005 PA 127; 2005 PA 132; 2005 PA 301; 2005 PA 322; 2004 PA 237; 2004 PA 238; 2004 PA 240; 2002 PA 542; 1999 PA 85; 1996 PA 494; 1995 PA 10.[7] These amendments have generally made registration more intrusive and onerous for registrants. Defendant argues that these successive amendments have turned what was originally only a law enforcement tool into a punishment for offenders.[8]

In 2011, SORA was amended to include "a consent exception . . . that provides some youthful offenders relief in situations involving consensual sex acts." *Temelkoski*, 307 Mich App at 261. The *Temelkoski* Court held that in light of these amendments, the analysis in *Dipiazza* was "outdated." *Id*. at 258.

[7] Defendant refers in his brief to the "legislative history" of these changes as purportedly recounted in the legislative analyses. But our Supreme Court has stated that such staff-prepared analyses are of little value to interpreting statutes and "[i]n no way can . . . be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in th[e] legislative process . . . ." *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

[8] We do not attempt to catalogue every amendment to SORA but only those that are most relevant to the resolution of the questions before us.

The sex offender registry as it first existed in 1995 was not public and was accessible only by law enforcement. *Dipiazza*, 286 Mich App at 142. Offenders were required to register for 25 years for their first offense and for life for a second or subsequent offense committed after October 1, 1995. MCL 28.725(3) and (4), as enacted by 1994 PA 295. In 1996, limited public inspection was allowed. MCL 28.730(2), as added by 1996 PA 494. Police agencies were required to make registry information for the zip codes within their jurisdiction "available for public inspection during regular business hours." *Id*.

In 1999, the registry became available to the public through the Internet. MCL 28.728(2), as amended by 1999 PA 85; *Dipiazza*, 286 Mich App at 142-143. Public Act 85 of 1999 also added more listed offenses requiring registration. MCL 28.722(d), as amended by 1999 PA 85. Further, Public Act 85 prescribed that persons convicted of certain offenses would be required to register for life. MCL 28.725(7), as amended by 1999 PA 85. Finally, offenders were required to report in person to verify their domicile or residence. MCL 28.725a, as added by 1999 PA 85.

In 2002, SORA was amended to require sex offenders who were students or employees at institutions of higher education to register with the law enforcement agency having jurisdiction over the institution's campus. MCL 28.724a, as added by 2002 PA 542. A registrant's status as a student or employee at such an institution began being listed on the registry. MCL 28.728(3)(b), as added by 2002 PA 542. Public Act 542 of 2002 also included a statement of legislative purpose:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's

> exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. [MCL 28.721a, as added by 2002 PA 542.]

In 2004, registrants were first required to pay a $35 registration fee. MCL 28.725a(6), as added by 2004 PA 237. Another 2004 amendment required that photographs of registrants be added to the registry. MCL 28.728(3)(c), as added by 2004 PA 238.

In 2005, SORA was amended to create "student safety zones." A student safety zone was defined as "the area that lies 1,000 feet or less from school property." MCL 28.733(f), as added by 2005 PA 121. Offenders were generally precluded from residing within student safety zones. MCL 28.735(1), as added by 2005 PA 121. This preclusion did not apply if the offender was residing within a student safety zone when the amendment became effective. MCL 28.735(3)(c), as added by 2005 PA 121.[9] Otherwise, an offender was required to "change his or her residence to a location outside the student safety zone not more than 90 days after he or she [was] sentenced for the conviction that [gave] rise to the obligation to register." MCL 28.735(4), as added by 2005 PA 121.

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[9] This exception did not apply "to an individual who initiate[d] or maintain[ed] contact with a minor within that student safety zone." MCL 28.735(3)(c), as added by 2005 PA 121.

Another amendment in 2005 precluded offenders from working or loitering within student safety zones. MCL 28.734, as added by 2005 PA 127. "Loiter" was defined as "to remain for a period of time and under circumstances that a reasonable person would determine [was] for the primary purpose of observing or contacting minors." MCL 28.733(b), as added by 2005 PA 121. This subsection likewise did not apply to a sex offender working within a student safety zone when the amendment became effective, MCL 28.734(3)(a), as added by 2005 PA 127, or to a sex offender "whose place of employment [was] within a student safety zone solely because a school [was] relocated or [was] initially established 1,000 feet or less from the individual's place of employment," MCL 28.734(3)(b), as added by 2005 PA 127.[10] In 2006, the public became eligible to receive a notification when a resident in a designated zip code was required to register as a sex offender or when a registered sex offender moved his or her residence to that zip code. MCL 28.730(3), as amended by 2006 PA 46.

In 2011, SORA underwent what defendant characterizes as a "sweeping overhaul." The recapture provision was added. MCL 28.723(1)(e), as added by 2011 PA 17. Further, sex offenders were classified into three tiers according to the offenses of which they were convicted. MCL 28.722(r) to (w), as added by 2011 PA 17. Tier I offenders were required to register for 15 years, Tier II offenders for 25 years, and Tier III offenders for life. MCL 28.725(10) to (12), as amended by 2011 PA 17. Offenders were also required to report in person when they changed residences, changed places of employ-

[10] Again, these exceptions did not apply "to an individual who initiate[d] or maintain[ed] contact with a minor within that student safety zone." MCL 28.734(3)(a) and (b), as added by 2005 PA 127.

ment, discontinued employment, enrolled as a student with institutions of higher education, discontinued such enrollment, changed their names, temporarily resided at any place other than their residence for more than seven days, established an e-mail or instant message address or "any other designations used in internet communications or postings," purchased or began regularly operating a vehicle, or discontinued such ownership or operation. MCL 28.725(1), as amended by 2011 PA 17.

In 2013, SORA was amended to require a $50 registration fee upon initial registration and each year thereafter, capped at $550. MCL 28.725a(6), as amended by 2013 PA 149. Further, the number of times and the specific months during which an offender had to report became dependent on the tier the offender fell into and the offender's birth month. MCL 28.725a(3), as amended by 2013 PA 149. In the present case, defendant, as a Tier III offender, must report four times each year for the rest of his life, MCL 28.725a(3)(c), as well as when any of the events listed in MCL 28.725(1) occur.

B. THE *MENDOZA-MARTINEZ* FACTORS

Determining whether a statutory scheme imposes a punishment requires a two-step inquiry. *Temelkoski*, 307 Mich App at 258. First, the Court must determine "whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Id*. (quotation marks and citation omitted). If the intent was to punish, the inquiry is complete. *Id*. But "if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id*. (quotation marks

and citations omitted; alteration in original). To do so, the Court looks to the seven factors enunciated in *Kennedy v Mendoza-Martinez*, 372 US 144; 83 S Ct 554; 9 L Ed 2d 644 (1963). *Temelkoski*, 307 Mich App at 259. Those factors are as follows:

> "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." [*People v Earl*, 495 Mich 33, 44; 845 NW2d 721 (2014), quoting *Mendoza-Martinez*, 372 US at 168-169.]

These seven factors serve as "useful guideposts" and are "neither exhaustive nor dispositive." *Earl*, 495 Mich at 44. Further, a party asserting that a statutory scheme imposes punishment must provide " 'the clearest proof that the statutory scheme is so punitive either in purpose or effect [as] to negate the [State's] intention to deem it civil.' " *Id*., quoting *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997) (quotation marks and citations omitted; second alteration in original).

In this case, defendant does not dispute that the Legislature did not intend SORA to constitute punishment. Indeed, the Legislature explicitly stated that its purpose was to protect the public's safety. MCL 28.721a. Based largely on this statement of purpose, this Court has "conclude[d] that the Legislature intended SORA as a civil remedy to protect the health and welfare of the public." *Temelkoski*, 307 Mich App at 262. Therefore, it is necessary to look to the *Mendoza-Martinez* factors to

determine whether the student safety zones and in-person reporting requirements are so punitive in purpose or effect that they negate the Legislature's intent to deem them civil. See *id*. at 262. In this endeavor, we first find instructive the United States Supreme Court's application of the *Mendoza-Martinez* factors to the Alaska sex offender registration statute in *Smith v Doe*, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003).

C. *SMITH*

"*Smith* . . . is the preeminent case holding that a sex offender registration and notification law, as applied to an adult defendant, is not a form of punishment." *Temelkoski*, 307 Mich App at 263. The United States Supreme Court applied the *Mendoza-Martinez* factors and determined that the Alaska sex offender registration statute, Alas Stat 12.63.010 *et seq*., did not constitute punishment for ex post facto purposes. *Smith*, 538 US at 97-106.

1. AFFIRMATIVE DISABILITY OR RESTRAINT

The *Smith* Court first observed that sex offender registration did not resemble imprisonment, "the paradigmatic affirmative disability or restraint." *Smith*, 538 US at 100. The Court noted that the Alaska statute did "not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Id*. The Court also reasoned that although registration may negatively affect offenders—in finding housing and employment, for example—"these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id*. at 101. Finally, the Court noted that offenders were not required to register in person. *Id*.

The Court also rejected the contention that registration is akin to probation or supervised release, although it acknowledged that the argument "ha[d] some force." *Smith*, 538 US at 101. The Court explained that "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction." *Id*. Sex offenders, on the other hand, were "free to move where they wish[ed] and to live and work as other citizens, with no supervision." *Id*. And although registrants were required to "inform the authorities after they change[d] their facial features (such as growing a beard), borrow[ed] a car, or [sought] psychiatric treatment, they [were] not required to seek permission to do so." *Id*. Further, although offenders faced criminal penalties for failing to comply with reporting requirements, those penalties arose from proceedings that were separate from their underlying offenses. *Id*. at 101-102.

2. HISTORICAL PUNISHMENTS

The Court found any resemblance between sex offender registration and historical shaming punishments "misleading." *Smith*, 538 US at 97-98. "Punishments such as whipping, pillory, and branding," the Court explained, "inflicted physical pain and staged a direct confrontation between the offender and the public." *Id*. at 98. Conversely, the stigma attached to a registered sex offender "results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id*. The Court reasoned, "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id*. The Court also stated

that adverse effects felt by registrants, such as "mild personal embarrassment" or "social ostracism" were not "an integral part of the objective of the regulatory scheme." *Id*. at 99.

The Court added that "[t]he fact that Alaska posts the information on the Internet d[id] not alter [its] conclusion." *Smith*, 538 US at 99. "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender," the Court explained. *Id*. "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id*. "The process is more analogous," the Court stated, "to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id*. The Court observed that the registry was passive, as a member of the public must seek out the information on the website. *Id*. The Court further noted that Alaska's website did not allow the public to shame an offender by, for example, "posting comments underneath his record." *Id*.

3. SCIENTER

The *Smith* Court found this factor to be "of little weight" without an extended explanation. *Smith*, 538 US at 105.

4. TRADITIONAL AIMS OF PUNISHMENT: DETERRENCE AND RETRIBUTION

In *Smith*, it was undisputed that the sex offender registry could potentially deter crime. *Smith*, 538 US at 102. But the Court noted that "[a]ny number of governmental programs might deter crime without imposing punishment." *Id*. The Court reasoned, " 'To hold that the

mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.' " *Id*., quoting *Hudson v United States*, 522 US 93, 105; 118 S Ct 488; 139 L Ed 2d 450 (1997).

The Court also disagreed with the proposition that registration was retributive because the length of time that an offender was required to register "appear[ed] to be measured by the extent of the wrongdoing, not by the extent of the risk posed." *Smith*, 538 US at 102 (quotation marks and citation omitted). Although the Court acknowledged that the statute "differentiate[d] between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense," it found that such "broad categories" and the "corresponding length of the reporting requirement" were "reasonably related to the danger of recidivism," which was "consistent with the regulatory objective." *Id*.

5. CRIMINAL BEHAVIOR

As with the scienter factor, the Court found this factor to be "of little weight." *Smith*, 538 US at 105. "The regulatory scheme applies only to past conduct, which was, and is, a crime," the Court explained. *Id*. The Court stated that this was "a necessary beginning point, for recidivism is the statutory concern." *Id*. The Court added that "[t]he obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." *Id*.

6. RATIONAL CONNECTION TO A NONPUNITIVE PURPOSE

The Court held that this was "a most significant factor in [its] determination that the statute's effects

[were] not punitive." *Smith*, 538 US at 102 (quotation marks and citation omitted). According to the Court, the Alaska sex offender registration statute had "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y]." *Id*. at 102-103 (quotation marks and citation omitted; alteration in original). According to the Court, the respondents acknowledged that this purpose was valid and rational. *Id*. at 103. They argued, however, that the statute "lack[ed] the necessary regulatory connection because it [was] not narrowly drawn to accomplish the stated purpose." *Id*. (quotation marks and citation omitted). The Court rejected that argument and stated, "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id*.

7. EXCESSIVENESS

The *Smith* Court rejected the contention that the statute was excessive because it applied to all convicted sex offenders without individual determinations of dangerousness. *Smith*, 538 US at 103. "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism," the Court reasoned. *Id*. The Court found this to be "consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id*. The Court noted that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " *Id*., quoting *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002). The Court stated, "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should

entail particular regulatory consequences." *Smith*, 538 US at 103-104. The Court further explained that a legislature has the power to fashion "a rule of universal application." *Id*. at 104 (quotation marks and citation omitted). "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Id*. The Court stated that Alaska was permitted to "dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause." *Id*.

The Court also rejected the argument that the duration of the reporting requirements was excessive. *Smith*, 538 US at 104. The Court relied on empirical research, which showed that most child molesters who reoffend do so not within the first several years after they were released but that offenders can reoffend as many as 20 years after release. *Id*.

The Court likewise rejected the contention that the registry was excessive because of its wide dissemination. *Smith*, 538 US at 104. The Court reiterated that the registry was passive because "[a]n individual must seek access to the information." *Id*. at 105. The Alaska website also warned "that the use of displayed information to commit a criminal act against another person is subject to criminal prosecution." *Id*. (quotation marks and citation omitted). "Given the general mobility of our population," the Court reasoned, "for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a

punishment." *Id*. The Court stated that determining excessiveness "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id*. The Court concluded that the Alaska statute met that standard. *Id*.

D. APPLICATION OF THE *MENDOZA-MARTINEZ FACTORS* TO STUDENT SAFETY ZONES AND IN-PERSON REPORTING REQUIREMENTS

This Court in *Temelkoski* generally endorsed the analysis in *Smith*. *Temelkoski*, 307 Mich App at 262-270. As noted, however, SORA has changed substantially since it was first enacted in 1994. Further, given its recent amendments, it is also markedly different from the Alaska statute reviewed by the United States Supreme Court in *Smith* in 2003. Although defendant argues that SORA as a whole is unconstitutional, he primarily takes issue with the student safety zones and in-person reporting requirements. *Temelkoski* did not address these particular provisions, although it generally held that sex offender registration does not impose punishment. *Id*. at 270. Under these circumstances, we conclude that sex offender registration is not punishment, and using the *Mendoza-Martinez* factors, we focus on whether the student safety zones and in-person reporting requirements are punitive in purpose or effect.[11]

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[11] The prosecution relies heavily on *Does 1-4 v Snyder*, 932 F Supp 2d 803, 811-814 (ED Mich, 2013), in which the court held that the recent amendments to SORA did not make the scheme punitive in effect. However, the court relied on cases from before the student safety zone and in-person reporting provisions were added to SORA. See *id*. Therefore, we find that decision unpersuasive.

1. AFFIRMATIVE DISABILITY OR RESTRAINT

a. STUDENT SAFETY ZONES

Some state courts have concluded that student safety zones impose an affirmative disability or restraint on sex offenders.[12] The Supreme Court of Indiana, addressing a similar provision barring sex offenders from residing within 1,000 feet of school property, held that such a restriction "is neither minor nor indirect." *State v Pollard*, 908 NE2d 1145, 1147, 1150 (Ind, 2009). The Indiana law, however, did not include a grandfather provision, and thus barred registrants from living within 1,000 feet of a school even if the registrant lived there before the law was passed. *Id*. at 1150. The law also required a registrant to change residences if a school or youth program center opened within 1,000 feet of the registrant's residence. *Id*.

The Supreme Court of Kentucky, addressing a provision disallowing sex offenders to live within 1,000 feet of a school, stated that it found it "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint." *Commonwealth v Baker*, 295 SW3d 437, 440, 445 (Ky, 2009). As with those subject to the Indiana law, a registrant in Kentucky "faces a constant threat of eviction" because he or she would be forced to move if a school opened within 1,000 feet of his or her home. *Id*.

But other courts have held to the contrary. The Supreme Court of Iowa, addressing a statute prohibiting sex offenders from living within 2,000 feet of a

[12] Cases from foreign jurisdictions are not binding on this Court, but they may be persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). Similarly, lower federal court decisions are not binding on this Court, but they too may be persuasive. *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013).

school, recognized that such a provision "clearly impose[s] a form of disability." *State v Seering*, 701 NW2d 655, 659, 668 (Iowa, 2005). But the court held that "the disabling nature of the statute is not absolute." *Id*. at 668. The court added, "[W]e are mindful of the objectives of the residency restriction under the statute and understand that a statute that imposes some degree of disability does not necessarily mean the state is imposing punishment." *Id*.

We agree with the reasoning of the Indiana and Kentucky courts. Prohibiting registrants from living and working in many areas is undoubtedly an affirmative restraint. Further, application of the grandfather clause in Michigan is limited to residences where the offenders were living on January 1, 2006. MCL 28.735(3)(c). If that clause does not apply and a person who lives in a student safety zone commits a sex offense and is required to register, he or she will be forced to leave his or her home. MCL 28.735(4). Therefore, rather than merely restraining sex offenders, the student safety zone restriction may expel offenders in certain circumstances. Also, an offender who is not protected by the grandfather clause faces the constant prospect that he or she will be forced to move if a new school opens near his or her home. Unlike in *Smith*, offenders in Michigan are not entirely free to change residences or jobs given the student safety zone provisions in SORA. Although we agree with the *Seering* court that such a restraint is not "absolute," it is a restraint nonetheless. See *Seering*, 701 NW2d at 668.

b. IN-PERSON REPORTING REQUIREMENTS

Some state courts have also concluded that frequent in-person reporting requirements impose an

affirmative disability or restraint. The Supreme Judicial Court of Maine held that a similar provision requiring quarterly, in-person reporting "place[d] substantial restrictions on the movements of lifetime registrants and may work an impractical impediment that amounts to an affirmative disability." *State v Letalien*, 2009 Me 130, ¶ 37; 985 A2d 4 (2009) (quotation marks and citation omitted). Distinguishing the reporting requirement at issue in *Smith*, the court stated that the requirement of quarterly, in-person reporting for life "is undoubtedly a form of significant supervision by the state." *Id*. "[I]t belies common sense," the court concluded, "to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting[13] and provide a current photograph,[14] is not a substantial disability or restraint on the free exercise of individual liberty." *Id*. at ¶ 58. The Supreme Court of New Hampshire recently endorsed the *Letalien* Court's reasoning. *Doe v State*, 167 NH 382, 405; 111 A3d 1077 (2015).

The Supreme Court of Oklahoma adopted the same reasoning regarding its similar in-person reporting requirements. *Starkey v Oklahoma Dep't of Corrections*, 2013 Okla 43, ¶ 49; 305 P3d 1004 (2013). Like defendant in the case at hand, the defendant in *Starkey* would have been required, under threat of prosecution, "to make an 'in person' appearance every 90 days for life and every time he moves, changes employment,

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[13] SORA requires fingerprinting only once. See MCL 28.727(1)(q).

[14] Under SORA, registrants must have a new photograph taken if "[t]he officer or authorized employee" determines that the registrant's preexisting photograph does not "match[] the appearance of the individual sufficiently to properly identify him or her from that photograph." MCL 28.725a(5).

changes student status, or resides somewhere for 7 consecutive days or longer." *Id*. See also MCL 28.725(1); MCL 28.725a(3)(c). The Supreme Court of Oklahoma deemed these requirements "significant and intrusive." *Starkey*, 2013 Okla 43 at ¶ 49.

But other courts have disagreed. In *United States v Parks*, 698 F3d 1, 6 (CA 1, 2012), the United States Court of Appeals for the First Circuit held that although periodic in-person reporting is inconvenient, such "inconvenience is surely minor compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." In *United States v WBH*, 664 F3d 848, 857 (CA 11, 2011), the United States Court of Appeals for the Eleventh Circuit likewise held that quarterly in-person reporting "may be more inconvenient, but requiring it is not punitive."

We agree with the reasoning of the Maine and Oklahoma courts. The reporting requirements in Michigan are onerous. Reporting requirements vary by tier, and Tier III offenders, such as defendant, are required to report in person four times a year for life. MCL 28.725a(3). In addition, MCL 28.725(1) provides that all registrants must report in person after any of the following events occur:

> (a) The individual changes or vacates his or her residence or domicile.
>
> (b) The individual changes his or her place of employment, or employment is discontinued.
>
> (c) The individual enrolls as a student with an institution of higher education, or enrollment is discontinued.
>
> (d) The individual changes his or her name.
>
> (e) The individual intends to temporarily reside at any place other than his or her residence for more than 7 days.

> (f) The individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.
>
> (g) The individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.
>
> (h) Any change required to be reported under section 4a.

In *Smith*, the United States Supreme Court noted that the reporting scheme in that case did not impose a disability or restraint because offenders were not required to report in person. *Smith*, 538 US at 101. In contrast, under SORA, offenders are required to report in person up to four times a year and after any of the events listed in MCL 28.725(1) occur. Many of the events listed in MCL 28.725(1) may occur frequently in the life of an average person. Thus, the in-person reporting requirements strike us as more than a mere inconvenience. Rather, we conclude that they amount to an affirmative disability or restraint.

2. HISTORICAL PUNISHMENTS

a. STUDENT SAFETY ZONES

Some courts have concluded that student safety zones are analogous to historical punishments. In *Pollard*, the Indiana Supreme Court stated that "restrictions on living in certain areas is not an uncommon condition of probation or parole." *Pollard*, 908 NE2d at 1151. Courts have also compared the restrictions to banishment. "Banishment" is defined as " 'a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life.' " *United States v Ju Toy*, 198 US 253, 269-270; 25 S Ct 644; 49 L Ed 1040 (1905), quoting *Black's Law Dictionary* (citation omitted). In *Baker*, the

Supreme Court of Kentucky found that the restrictions that prevented offenders from living in certain areas and that expelled offenders from their homes were "decidedly similar to banishment." *Baker*, 295 SW3d at 444. In *Starkey*, the Oklahoma Supreme Court concurred with that reasoning. *Starkey*, 2013 Okla 43 at ¶ 60.

But other courts have denied that the prohibition against residing in student safety zones is similar to banishment. The Supreme Court of Iowa stated that although a defendant "may have a sense of being banished to another area of the city, county, or state, true banishment goes beyond the mere restriction of 'one's freedom to go or remain where others have the right to be: it often works a destruction on one's social, cultural, and political existence.' " *Seering*, 701 NW2d at 667, quoting *Poodry v Tonawanda Band of Seneca Indians*, 85 F3d 874, 897 (CA 2, 1996). The court added that "[o]ffenders are not banished from communities and are free to engage in most community activities." *Id*. at 667.

We agree with the reasoning in *Pollard* and *Baker* that the restrictions created by the student safety zone provisions resemble banishment. Unlike the circumstances in *Smith*, SORA registrants are affirmatively barred from living in certain areas. Also, unless offenders are protected by the limited grandfather provision, they can be expelled from their residences as a consequence of registration. Although admittedly not true banishment, we find the similarity undeniable. Therefore, we believe that the restrictions imposed by the student safety zones have historically been regarded as a punishment.

b. IN-PERSON REPORTING REQUIREMENTS

Cases addressing in-person reporting requirements

have focused on their similarity to supervised probation and parole. The Supreme Court of Indiana concluded that in-person reporting was "comparable to conditions of supervised probation or parole." *Wallace v State*, 905 NE2d 371, 380 (Ind, 2009). However, the Wyoming Supreme Court, relying on *Smith*, disagreed that in-person reporting requirements were similar to supervised probation or parole. *Kammerer v State*, 2014 Wy 50, ¶ 22; 322 P3d 827 (2014). The court denied that in-person reporting was similar to "monitoring . . . imposed under supervised probation or parole . . . ." *Id*.

Many of the considerations noted by *Smith* still apply to Michigan's current Sex Offenders Registration Act. Sex offenders are not required to seek permission to do many things, such as change residences or cars, but are only required to report such changes. Also, penalties for failing to comply with SORA arise from proceedings separate from the offender's underlying offense. But the scheme examined in *Smith* did not entail in-person reporting. As stated, defendant, as a Tier III offender, must report in person four times each year for the rest of his life, MCL 28.725a(3)(c), as well as when any of the events listed in MCL 28.725(1) occur. This is far more intrusive than the reporting requirements in *Smith* and imposes a great amount of supervision by the state. We agree with the *Wallace* court that such demanding in-person reporting requirements are at least "comparable to conditions of supervised probation or parole." See *Wallace*, 905 NE2d at 380.

3. SCIENTER

This Court has declined to consider this factor in assessing whether sex offender registration constitutes

punishment. See *Temelkoski*, 307 Mich App at 262.[15] Therefore, we too decline to address the factor.

4. TRADITIONAL AIMS OF PUNISHMENT: DETERRENCE AND RETRIBUTION

a. STUDENT SAFETY ZONES

Some courts have concluded that student safety zones promote deterrence and retribution to such a degree that they are punitive. In *Pollard*, the Indiana Supreme Court stated that such restrictions are "apparently designed to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes." *Pollard*, 908 NE2d at 1152. The court determined that the provision was "an even more direct deterrent to sex offenders than the . . . registration and notification regime." *Id*. In *Baker*, the Supreme Court of Kentucky found that such restrictions are retributive given that there was "no individualized determination of the dangerousness of a particular registrant." *Baker*, 295 SW3d at 444. The court noted that "[e]ven those registrants whose victims were adults are prohibited from living near an area where children gather." *Id*. "When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety," the court concluded, "that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones." *Id*. In *Starkey*, the Oklahoma Supreme Court essentially adopted the same reasoning. *Starkey*, 2013 Okla 43 at ¶ 66. Courts concluding to the contrary have

[15] We note that other courts have concluded that because most sex offenses require a finding of scienter, this factor counsels in favor of deeming registration punishment. See, e.g., *Doe v State*, 189 P3d 999, 1012-1013 (Alas, 2008).

relied on the statement from *Smith*, 538 US at 102, that government programs can "deter crime without imposing punishment." See, e.g., *Seering*, 701 NW2d at 668; *Kammerer*, 2014 Wy 50 at ¶ 26.

The primary reason for the creation of the student safety zones is the desire to specifically deter registrants from committing future sexual offenses. As in *Pollard*, it appears that the provisions were "designed to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes." *Pollard*, 908 NE2d at 1152. Nonetheless, the disclaimer from *Smith* still applies: "Any number of governmental programs might deter crime without imposing punishment." *Smith*, 538 US at 102. But the student safety zone provisions are unlike the statute at issue in *Smith*. In that case, the Alaska statute was a passive notification scheme designed to allow members of the public to protect themselves from sex offenders. In this case, the student safety zone provisions are not passive. Rather, registrants are specifically prohibited from living, working, and loitering in many areas. We agree with the observation of the *Pollard* court that student safety zones are "an even more direct deterrent to sex offenders than the . . . registration and notification regime." *Pollard*, 908 NE2d at 1152. In sum, we find that the foremost purpose of the student safety zones is deterrence.

However, we disagree that the student safety zones are necessarily retributive. Although the observations of the *Baker* Court have some merit, we are mindful that the Legislature is permitted to enact laws directed at sex offenders as a class without individual determinations of future dangerousness. See *Smith*, 538 US at 103-104. It is the province of the Legislature to determine that all sex offenders, regardless of their offenses,

should be segregated from children. While one can reasonably question the usefulness of such a broadly sweeping measure, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id*. at 103. Therefore, we cannot say that the student safety zones have the purpose or effect of promoting retribution.

b. IN-PERSON REPORTING REQUIREMENTS

Cases have not extensively addressed whether in-person reporting requirements promote deterrence and retribution. The requirements are designed to ensure that the information provided on the registry is accurate and up-to-date. Accurate and up-to-date information is essential to "monitor[ing] those persons" who the "legislature has determined . . . pose[] a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." MCL 28.721a. Therefore, we cannot conclude that such measures necessarily promote deterrence or retribution. Still, we acknowledge that more rigorous reporting requirements could promote deterrence and retribution. If, for example, offenders were required to report in person twice daily, such onerous requirements could begin to appear less useful to promoting the regulatory goals of SORA and more like deterrence and retribution. However, the reporting requirements are not so extreme. Tier III offenders—those subjected to the most frequent reporting requirements—are only required to report four times each year, as well as when any of the events listed in MCL 28.725(1) occur. See MCL 28.725a(3)(c). Although certainly burdensome for the offenders, we cannot say that these requirements promote deterrence or retribution to such an extent that they are punitive.

5. CRIMINAL BEHAVIOR

Like the United States Supreme Court, this Court has declined to consider this factor in assessing whether sex offender registration constitutes punishment. See *Smith*, 538 US at 105; *Temelkoski*, 307 Mich App at 262.[16] Therefore, we too decline to address this factor.

6. RATIONAL CONNECTION TO A NONPUNITIVE PURPOSE

As defendant admits, nearly every court has held that sex offender registration laws serve the nonpunitive purpose of promoting public safety. However, defendant questions whether the connection is rational. He calls attention to law review articles that advance the proposition that registration laws do not reduce recidivism and that sex offenders, as a class, are not prone to recidivism. While perhaps true that in certain circumstances the student safety zones and in-person reporting requirements do more harm than good, we cannot conclude that they are irrational measures for accomplishing the stated regulatory purpose of SORA. Moreover, we are not charged with determining the wisdom of these measures. Such questions are for the Legislature to decide. See *People v Wallace*, 284 Mich App 467, 470; 772 NW2d 820 (2009) (noting that the wisdom of a policy is a political question). Similarly, the Legislature is charged with the authority to revisit, if it so chooses, the efficacy of the legislation.

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[16] We note that the Alaska Supreme Court, in *Doe*, concluded that because registration laws only applied to convicted sex offenders and not "other individuals who may pose a threat to society even if they were not convicted," the effect was punitive. *Doe*, 189 P3d at 1014-1015. For example, registration laws do not apply to "defendants whose convictions are overturned for reasons other than insufficiency of evidence of guilt . . . despite having engaged in the same conduct" as an offender who is forced to register. *Id*. at 1015.

To the extent that defendant and amicus argue that the recapture provision is not rational as applied to defendant given that defendant's last sex offense conviction was 25 years ago, we must disagree. The argument has some merit, but we cannot conclude that requiring defendant to register as a sex offender is wholly irrational. Although defendant's sex offense conviction was 25 years ago, he committed another felony in 2013, and has "shown a general tendency to recidivate." See *People v Fredericks*, 2014 Ill App (1st) 122122, ¶ 60; 383 Ill Dec 293; 14 NE3d 576 (2014).

7. EXCESSIVENESS

a. STUDENT SAFETY ZONES

Some courts have held that the broad application of student safety zones is excessive. The Supreme Court of Indiana stated, "Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes." *Pollard*, 908 NE2d at 1153. The Supreme Court of Kentucky likewise concluded that given the magnitude of the restraint imposed by residency restrictions, the failure to make an individual determination of the danger a registrant may pose in the future rendered the restrictions excessive. *Baker*, 295 SW3d at 446. Other courts have concluded to the contrary. The Supreme Court of Iowa concluded that given "the special needs of children" and "the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend," residency restrictions are not excessive. *Seering*, 701 NW2d at 668.

We find that the Supreme Court's observations in *Smith* still apply. The Legislature is "not preclude[d] . . . from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103-104. The Court explained that the legislature had the power to fashion "a rule of universal application." *Id*. at 104 (quotation marks and citation omitted). Further, "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Id*.

One can reasonably question the usefulness of prohibiting certain offenders from living and working within student safety zones even though their offenses were not committed against children. Despite these reservations, as we have already noted, the wisdom of a statute is a question for the Legislature. *Wallace*, 284 Mich App at 470. Moreover, the Legislature was not precluded from making categorical judgments of this nature. *Smith*, 538 US at 103. Therefore, the student safety zone restrictions are not excessive.

b. IN-PERSON REPORTING REQUIREMENTS

Courts have not extensively addressed whether in-person reporting requirements are excessive. The Supreme Court of New Hampshire found the lifetime duration of registration to be excessive. *Doe*, 167 NH at 410. "If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive." *Id*. We disagree. Again, the Legislature is tasked with determining the risk posed by sex offenders. Moreover, although the in-person reporting requirements of SORA are onerous, it is difficult to

conclude that they are necessarily excessive. Rather, as stated, they are reasonably designed to ensure that the information on the registry is accurate and up-to-date. Therefore, the in-person reporting requirements are not excessive.

E. CONCLUSION

1. STUDENT SAFETY ZONES

As is apparent from our foregoing discussion, the *Mendoza-Martinez* factors point us in both directions when it comes to student safety zones. We conclude that student safety zones impose affirmative restraints, resemble historical punishments, and promote deterrence. However, we also conclude that they are rationally connected to the nonpunitive purpose of public safety and that they are not excessive, because the Legislature is permitted to make the categorical judgment that sex offenders should not live, work, or loiter near schools. Weighing these factors, we are mindful that the burden lies with defendant to establish that student safety zones are punitive. As stated, a party asserting that a statutory scheme imposes punishment must provide "the clearest proof" that the scheme " 'is so punitive either in purpose or effect [as] to negate the . . . intention to deem it civil.' " *Earl*, 495 Mich at 44, quoting *Hendricks*, 521 US at 361 (quotation marks and citations omitted). In this case, because the *Mendoza-Martinez* factors cut both ways, we cannot conclude that defendant has met his burden. Further, even some of the factors that weigh in defendant's favor only do so to a limited extent. Student safety zones plainly restrict where offenders can live and work, but the restrictions are not absolute, and therefore, the restrictions are distinguishable from true banishment. And although student safety zones spe-

cifically deter registered offenders, the *Smith* Court held that a deterrent purpose alone will not render a civil regulatory scheme punitive. *Smith*, 538 US at 102. Moreover, the nonpunitive purpose of the student safety zones is "a most significant factor" in determining whether they are punitive in effect. See *id*. (quotation marks and citation omitted). Given these considerations, there is not the clearest proof that the student safety zone restrictions are so punitive in purpose or effect as to negate the Legislature's intent to deem them civil.

2. IN-PERSON REPORTING REQUIREMENTS

Regarding the in-person reporting requirements, the *Mendoza-Martinez* factors do not readily lead to one conclusion over the other. The requirements impose affirmative restraints and arguably resemble conditions of supervised probation or parole. However, the reporting requirements do not necessarily promote deterrence or retribution, they are rationally connected to the nonpunitive purpose of protecting the public by ensuring that the registry is accurate, and they are not excessive. As with the student safety zones, we cannot find the clearest proof that the in-person reporting requirements are punitive in effect given that the *Mendoza-Martinez* factors cut both ways. Further, we again find that even some of the factors that weigh in defendant's favor only do so to a limited extent. Although the reporting requirements are undeniably burdensome, their restraining effect is not absolute. Registrants are not precluded from many activities, such as changing residences or jobs, but are merely required to report them. And many of the considerations that *Smith* used to distinguish sex offender registration from supervised probation or pa-

role still apply to the in-person reporting requirements. Given these considerations, we conclude that there is not the clearest proof that the in-person reporting requirements are so punitive in purpose or effect as to negate the Legislature's intent to deem them civil.

IV. CONCLUSION

We conclude that the recapture provision in MCL 28.723(1)(e) is constitutional. First, the recapture provision did not change the legal consequences of defendant's 1990 conviction. Rather, it attached legal consequences to his 2013 felony conviction. Therefore, that provision does not violate the Ex Post Facto Clauses of the state and federal constitutions. Second, the student safety zones and in-person reporting requirements of SORA do not constitute punishment. Therefore, they necessarily cannot constitute cruel or unusual punishment.

Affirmed.

HOEKSTRA, P.J., and JANSEN and METER, JJ., concurred.

BILL AND DENA BROWN TRUST v GARCIA

In re BROWN ESTATE

Docket Nos. 322401 and 322402. Submitted October 8, 2015, at Petoskey. Decided October 20, 2015, at 9:00 a.m.

In Docket No. 322401, Mark Brown (plaintiff), son of the late Bill and Dena Brown and trustee of the Bill and Dena Brown Trust, brought an action in the Montmorency Circuit Court to quiet title to what had been the Browns' marital home, asserting that Bill Brown did not have the authority to convey the property to himself after Dena Brown died because doing so was contrary to the intent of the trust that the property pass to the trust beneficiaries after the death of both original settlors. After Dena Brown died and Bill Brown became the sole trustee of the trust, Bill Brown had conveyed the marital home to himself by means of a "Lady Bird" quitclaim deed, which provided that if Bill Brown did not otherwise dispose of the property during his lifetime, on his death, the property would pass to Geri Garcia (defendant), a woman who had recently discovered that she was likely the daughter of Bill's brother, John Brown.

Docket No. 322402, plaintiff filed a petition in the Montmorency County Probate Court contesting Bill Brown's February 10, 2012 will on the basis that it was the product of undue influence by defendant. Bill and Dena Brown had initially executed identical wills that provided for transfer of property to the trust, or, if the testator's spouse did not survive and the trust no longer existed, then specific distribution provisions mirrored those of the trust. In the 2012 will, Bill Brown disinherited his two children and their children, devised the residue of his estate to defendant, and appointed defendant the personal representative of his estate. After Probate Judge Benjamin Bolser disqualified himself from hearing the matter, the State Court Administrator assigned the case to Circuit Judge Michael G. Mack, and the two actions were consolidated.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), and defendant moved for summary disposition under MCR 2.116(I). After a hearing, the court issued an opinion and order granting in part defendant's motion and

denying plaintiff's motion, ruling that the terms of the trust authorized Bill Brown to execute the Lady Bird deed. With regard to the undue-influence claim, the court issued a separate opinion and order granting defendant's motion for summary disposition because all the deposition testimony supported the conclusion that Bill Brown was acting of his own volition and plaintiff had presented no evidence to the contrary. The court also rejected consideration of a presumption of undue influence because the evidence did not demonstrate a confidential or fiduciary relationship between defendant and Bill Brown. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court correctly ruled that the trust granted Bill Brown the authority to execute the Lady Bird deed quitclaiming the marital home to himself with a remainder to defendant. Further, the trial court correctly ruled that the conveyance did not alter or amend any part of the trust. The trust's plain terms authorized a settlor serving as trustee to engage in self-dealing and also plainly authorized a settlor to direct the trustee with respect to any matter concerning the administration or distribution of trust assets. The trust further authorized the trustee to make distribution or division of trust assets in cash or in kind, to deal in real property or any interest therein as the trustee deemed appropriate and without regard to the duration of such interests, and to execute and deliver an instrument that accomplished or facilitated the exercise of a power vested in the trustee. Plaintiff's assertion that the quitclaim deed effectively modified or partially revoked the trust was untrue, despite the fact that the quitclaim deed diminished the amount of property subject to distribution, given that the trust's terms remained unchanged from the time that Bill and Dena Brown last jointly amended it. The fact that Bill and Dena Brown could have taken title to the marital home as joint tenants with rights of survivorship but instead took title to the property as cotrustees did not establish that they intended the property to remain in the trust. The plain terms of the trust, not speculation regarding what the settlors might have done but did not do, established the settlors' intent. Therefore, the trial court properly granted defendant summary disposition regarding plaintiff's action to quiet title with respect to the marital home.

2. The trial court properly granted defendant summary disposition of plaintiff's undue-influence claim and did not abuse its discretion by denying his motion for reconsideration. Plaintiff failed to produce any evidence creating a material question of fact that either the Lady Bird deed or Bill Brown's 2012 will

was the product of defendant's undue influence. The trial court also correctly ruled that no evidence was presented to establish the existence of a confidential or fiduciary relationship between Bill Brown and defendant that would have invoked a presumption of undue influence with respect to the documents in question.

Affirmed.

Lipson, Neilson, Cole, Seltzer & Garin, PC (by *C. Thomas Ludden* and *Jeffrey T. Neilson*), for the Bill and Dena Brown Trust and Mark Brown.

Gault Davison, PC (by *Edward B. Davison* and *Margaret Brandenburg*), for Geri Garcia.

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM. In these consolidated cases involving an action to quiet title in Docket No. 322401 and a will contest in Docket No. 322402, plaintiff Mark Brown appeals by right the trial court's order granting defendant Geri Garcia summary disposition with respect to plaintiff's claim that the trust agreement did not authorize the trustee's deed at issue.[1] Plaintiff also appeals by right the trial court's order granting summary disposition with respect to plaintiff's claim of undue influence by defendant. For the reasons discussed in this opinion, we affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

Bill Brown and Dena Brown established an irrevocable trust as part of their estate planning that was

[1] Although Mark Brown is designated as "appellant" and Geri Garcia as "appellee" in Docket No. 322402, for ease of reference, they will be referred to respectively as "plaintiff" and "defendant" throughout this opinion.

intended to distribute their assets to various beneficiaries after both had died. After Dena passed away, Bill became the sole trustee of the trust. Bill, as trustee, conveyed the marital home that was a trust asset to himself by means of a "Lady Bird" quitclaim deed,[2] which provided that the property would pass to defendant on his death if Bill did not otherwise dispose of the property during his lifetime. Bill did not otherwise dispose of the property before his death. Plaintiff, the successor trustee, asserts that Bill did not have the authority to convey the property to himself after Dena died because doing so was contrary to the intent of the trust that the property pass to the trust beneficiaries after the death of both original settlors. According to plaintiff, the Lady Bird deed, in essence, partially revoked an irrevocable trust. Plaintiff argues that the trial court erred by ruling that the terms of the trust permitted Bill's action.

Plaintiff also argues that defendant was in a fiduciary relationship with Bill and exercised undue influence over Bill with respect to executing the Lady Bird deed. Plaintiff asserts that the trial court erred by granting defendant summary disposition regarding his undue-influence claim because questions of material fact remain.

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[2] This type of quitclaim deed is named after President Lyndon Johnson's wife, "Lady Bird," because President Johnson was thought to have once used this type of deed to convey some land to her. *In re Tobias Estates*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2012 (Docket No. 304852), p 5. A Lady Bird deed conveys an enhanced life estate that reserves to the grantor "the rights to sell, commit waste, and almost everything else[.]" *Id*. (quotation marks and citation omitted). See also *Black's Law Dictionary* (10th ed), p 503 (defining a "Lady Bird" deed as "[a] deed that allows a property owner to transfer ownership of the property to another while retaining the right to hold and occupy the property and use it as if the transferor were still the sole owner").

On June 8, 2007, Bill and Dena as husband and wife created the Living Trust Agreement of Bill M. Brown and Dena G. Brown (the trust). Bill and Dena also executed, on the same day, identical wills that provided for transfer of property to the trust, or, if the testator's spouse did not survive and the trust no longer existed, then specific distribution provisions mirrored those of the trust. A year later, on June 11, 2008, Bill and Dena exercised their authority under the terms of the trust by amending it and their wills to alter the named beneficiaries. These amendments did not alter the terms of the trust at issue in this appeal.

On February 28, 2008, Bill and Dena acquired the subject property located at 10395 South Airport Road, Avery Township, Montmorency County, for $180,000. The former owners[3] conveyed the property by warranty deed to Bill and Dena as trustees of the trust. Because Dena had cancer, the Browns moved to this home to be closer to Bill's former daughter-in-law, Eunice Ruth Dahn, who was a caregiver for both. Dena died on August 10, 2008.

Defendant was born in California on April 22, 1983, and immediately placed for adoption. In October 2009, defendant was contacted by her birth mother, Pam Altz, who informed defendant that her natural father was John Brown, the brother of Bill. Thereafter, defendant contacted John, who rejected defendant's assertion that he was her natural father and also refused to provide a genetic sample for the purpose of testing.

At some point, Altz provided defendant's telephone number to Bill, and he called defendant. After defendant wrote Bill a letter about herself and her family on August 19, 2010, Bill and defendant regularly commu-

[3] One of the property's former owners was Yvonne Currie, who came to know the Browns as customers at the bank where she worked.

nicated by telephone and mail. In June 2011, defendant flew from California to Michigan and visited Bill at his home. On January 12, 2012, Bill submitted genetic material for testing and comparison to samples from defendant. The test results excluded Bill as being her possible father, but concluded that the probability the two were related was 97.7% and that the "likelihood that the alleged relative is the biological relative of the tested child is 43 to 1." Bill apparently provided the test results to John, who responded in a March 8, 2012 letter indicating he thought that the information showed that Bill was her real father.

In February 2012, defendant traveled from California to Michigan for her second visit with Bill. On February 10, 2012, Bill and defendant went to a local branch of PNC Bank, where Bill added her as a joint owner with rights of survivorship to various accounts. Bill and defendant then went to the office of attorney Benjamin Bolser, and Eunice Ruth Dahn joined them. Bill had previously consulted with Bolser and various documents were ready for signature. Defendant—and, if she was unable to serve, Eunice Ruth Dahn—was named as Bill's attorney-in-fact (durable power of attorney); defendant and Dahn were similarly appointed as Bill's patient advocate (durable power of attorney for healthcare). Bill executed a last will and testament that (1) disinherited his two children and their children, (2) devised and bequeathed all the residue of his estate to defendant, and (3) appointed defendant the personal representative of his estate. Bill also signed a living will that directed the withholding of medical treatment in certain circumstances. Finally, Bill, as the sole surviving settlor-trustee, conveyed the Airport Road property to himself as an individual by means of a Lady Bird quitclaim deed that

would pass the property to defendant if Bill did not otherwise dispose of it during his lifetime.

After February 2012, defendant, accompanied by various members of her family, visited Bill for short periods of no more than 5 days in March, April, August, and October 2012. John Brown continued to disbelieve defendant's claim of paternity. He wrote to his brother Bill on October 31, 2012, and admonished Bill to not give anyone his cell phone number: "I'm not going to be called and harassed anymore by all of those so called kids of mine who read about me and are after my money . . . ." Plaintiff, John's son, became the successor trustee of the Bill and Dena Brown trust after Bill passed away on January 16, 2013.

Plaintiff, as successor trustee, filed an action in the circuit court on February 1, 2013 to quiet title in the trust to the Airport Road property (Docket No. 322401; LC No. 13-003254-CH). This case requested that the Lady Bird deed be declared null and void because it was in contradiction to the terms of the trust. Defendant filed an answer on March 1, 2013, denying that the deed was contrary to the terms of the trust. In later proceedings, plaintiff developed his alternative theory that defendant had used undue influence to cause Bill to execute the deed. This case was assigned to Circuit Judge Michael G. Mack.

On March 8, 2013, defendant, as Bill's nominated personal representative in his February 10, 2012 will, filed a petition in probate court for formal appointment as personal representative and for determination of heirs (Docket No. 322402; LC No. 13-007003-DE). Plaintiff appeared by counsel on March 25, 2013. At a hearing held on April 4, 2013 before Probate Judge Benjamin Bolser, the parties stipulated the entry of an order maintaining the status quo. Judge Bolser, be-

cause of his prior involvement as an attorney and witness to the matters in controversy, disqualified himself from hearing the matter. The State Court Administrator assigned this case to Judge Mack. On April 22, 2013, plaintiff filed a petition contesting probate of the February 10, 2012 will on the basis that it was the product of undue influence and sought instead to probate Bill Brown's June 11, 2008 will. On May 13, 2013, the parties and Judge Mack agreed to consolidate the two actions.

In June 2013, plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), and defendant responded with her own motion for summary disposition under MCR 2.116(I). Judge Mack held a hearing on the motions on July 15, 2013. The trial court took the motions under advisement and subsequently issued an opinion and order on August 8, 2013, granting in part defendant's motion and denying plaintiff's motion. The trial court concluded the terms of the trust authorized Bill Brown as the surviving settlor-trustee to execute the Lady Bird deed. In particular, the trial court relied on Article VII of the trust, which provided that "[d]uring Settlor's lifetime, however, Settlor may direct Trustee with respect to any matter concerning the . . . distribution . . . of trust assets." Although Article II prohibited the surviving settlor from revoking or amending the trust in any way, the court found persuasive that Article VII powers referred to a singular settlor. Therefore, the court ruled that "[w]hen [Bill] Brown executed the Lady Bird deed on February [10], 2012 he was properly acting under the authority granted to him in Article VII. Additionally, Section 7.10 allowed him, as trustee, to 'deal in real property . . . without regard to the duration of such interest.' "

The undue-influence claim, however, remained pending, and following further discovery, defendant moved for summary disposition regarding that claim. After the parties presented oral arguments and further briefing, the trial court issued an opinion and order on May 8, 2014, granting defendant's motion. The trial court relied primarily on the deposition of bank employee Yvonne Currie, who assisted Bill Brown in making defendant a joint owner of various accounts, and the testimony of then attorney Benjamin Bolser, who drafted and witnessed the various documents executed at his office on February 10, 2012. The trial court ruled that "all of the testimony supports the conclusion that Bill Brown was acting of his own volition and not subject to any undue influence" and that "[p]laintiff has presented no evidence to the contrary." The trial court also rejected consideration of a presumption of undue influence because "the evidence has not demonstrated a confidential or fiduciary relationship between [defendant] and Bill Brown." The trial court entered an opinion and order denying plaintiff's motion for reconsideration on June 5, 2014. Plaintiff now appeals by right.

II. THE TRUST

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence, the substance or content of which would be admissible at trial. *Id*. at 120-121; *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The

court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. A court should grant the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the undisputed evidence shows that any party is entitled to judgment as a matter of law, the court may enter judgment for that party. MCR 2.116(I)(1) and (2); *In re Baldwin Trust*, 480 Mich 915 (2007).

The interpretation of a trust agreement is also a question of law reviewed de novo on appeal. *In re Herbert Trust*, 303 Mich App 456, 458; 844 NW2d 163 (2013). "A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust." *Id*. The settlor's intent is ascertained by looking to the words of the trust itself. *In re Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). If the trust's terms are ambiguous, a court must look outside the document to determine the settlor's intent, and it may consider the circumstances surrounding the creation of the trust and the general rules of construction. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The fact that litigants disagree regarding the meaning of a trust, however, does not mean that it is ambiguous. See *Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143; 84 NW2d 441 (1957) (noting litigants espousing different positions regarding the proper interpretation of a will did not render its terms ambiguous); *In re Reis-*

man Estate, 266 Mich App 522, 527; 702 NW2d 658 (2005) ("The rules of construction applicable to wills also apply to the interpretation of trust documents."). A court must also read a trust as a whole, harmonizing its terms with the intent expressed, if possible. *In re Raymond Estate*, 483 Mich 48, 52; 764 NW2d 1 (2009). In sum, a court must enforce the plain and unambiguous terms of a trust as they are written. *Id.*; *Reisman Estate*, 266 Mich App at 527.

B. DISCUSSION

The trust's plain terms authorize a settlor serving as trustee to engage in self-dealing and also plainly authorize a settlor to direct the trustee "with respect to any matter concerning the administration [or] distribution . . . of trust assets." The trust further authorizes the trustee to "[m]ake distribution or division of trust assets in cash or in kind," to "deal in real property, or any interest therein, as Trustee deems appropriate and without regard to the duration of such interests," and to "[e]xecute and deliver an instrument that accomplishes or facilitates the exercise of a power vested in Trustee." Consequently, the trial court correctly ruled that the trust granted Bill Brown as the surviving settlor-trustee the authority under Article VII to execute the February 10, 2012 Lady Bird deed quitclaiming the Airport Road property to himself, with a remainder to defendant. Further, the trial court correctly ruled that the conveyance did not alter or amend any part of the trust. Thus, the trial court properly granted defendant summary disposition regarding plaintiff's action to quiet title with respect to the Airport Road property.

Plaintiff's arguments to the contrary lack merit. First, plaintiff asserts that the February 10, 2012

quitclaim deed is contrary to the purpose of the trust to distribute the trust's assets to various named beneficiaries after the death of both settlors. While plaintiff contends that the quitclaim deed effectively modified or partially revoked the trust, this is simply not true given that the trust's terms remain unchanged from the time that Bill Brown and Dena Brown last jointly amended it. While the quitclaim deed clearly diminishes the amount of property subject to distribution according to its terms, the trust itself was not modified. Nevertheless, plaintiff asserts, without citation to any provision in the trust, that "neither Bill Brown nor Dena Brown could unilaterally remove" the Airport Road property from the trust. But plaintiff fails to cite any authority to support his argument that when a married couple establishes an estate plan that includes a trust, the surviving settlor-trustee is precluded from transferring property from the trust even if doing so is within the discretion vested in the settlor or trustee by the terms of the trust document. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). "And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Plaintiff also posits that because Bill Brown and Dena Brown could have taken title to the Airport Road property as joint tenants with rights of survivorship but instead took title to the property as co-trustees, they intended the property to remain in the trust. This argument is unavailing. What the settlors might have done, but did not do, does not establish the settlors' intent with respect to the trust. Rather, the plain terms

of the trust establish the settlors' intent. *Raymond Estate*, 483 Mich at 52; *Reisman Estate*, 266 Mich App at 527. As discussed already, the terms of the trust plainly afford the surviving settlor-trustee broad authority to engage in self-dealing, to distribute trust assets in cash or in kind, to deal in real estate, and to execute such instruments on such terms as the trustee deems appropriate. The trustee's exercise of these powers that has the effect of diminishing trust assets available for distribution after the death of the last surviving settlor is nowhere prohibited by the terms of the trust. This is not an absurd result, as plaintiff argues, but one the settlors plainly contemplated. Paragraph 4.2 of the trust provides that the trustee may "pay to Settlors or apply for Settlors' benefit amounts of principal (even to the exhaustion of the trust) as Trustee, in Trustee's discretion, deems necessary or advisable to maintain Settlors' customary standard of living." While this provision does not specifically authorize the quitclaim deed at issue, it demonstrates that the trust was first and foremost drafted for the settlors' benefit during their lifetimes. It provides no guarantee that "other" beneficiaries under Article V would receive any distribution after the death of the last surviving settlor.

Moreover, in a similar context of a married couple's estate plan, this Court has rejected imposing restrictions on the surviving spouse's ability to dispose of the couple's property after the death of a spouse unless the estate planning documents specifically impose restrictions. *In re Leix Estate*, 289 Mich App 574, 590-591; 797 NW2d 673 (2010). The *Leix* case concerned an agreement to make mutual wills that would provide that, on the death of the survivor, all of the survivor's property would go into a trust for a granddaughter for her life, and on the granddaughter's death, the remainder

would be divided into three equal shares for the granddaughter's issue and two other heirs or their issue. *Id*. at 578. After the death of his spouse, the survivor transferred nearly all his assets into accounts held jointly with the granddaughter and also transferred real estate to himself and the granddaughter as joint tenants with survivorship rights. *Id*. at 576. "One of the effects of the transfers was to divest the trust of assets that the contingent trust beneficiaries might have received upon [the granddaughter's] death." *Id*. at 578. The other heirs brought an action to impose a constructive trust, contending that the survivor's lifetime transfers violated the agreement to execute mutual wills. The trial court granted summary disposition to the granddaughter because "nothing in the agreement put any restrictions on what the surviving party could do with the parties' assets"; therefore, the asset transfers did not breach the agreement. *Id*. at 577.

On appeal, this Court first held that the agreement to execute mutual wills was valid and became binding on the death of the first spouse. *Id*. at 578-579, citing *Schondelmayer v Schondelmayer*, 320 Mich 565, 572; 31 NW2d 721 (1948). However, the mutual-will agreement did not apply to specific property and did not restrict the survivor's ability to dispose of property during the survivor's lifetime. After surveying conflicting caselaw from other jurisdictions, the Court rejected the "appellant's invitation to recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills." *Leix Estate*, 289 Mich App at 590. The Court reasoned that " '[a]n unambiguous contract must be enforced according to its terms.' " *Id*., quoting *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004). Further, courts must enforce an agreement as written absent an unusual circumstance, such as the

contract's violating the law or being contrary to public policy. *Leix Estate*, 289 Mich App at 590-591. The *Leix Estate* Court held that these contract principles applied to the contract to make a mutual will. Consequently, the Court held that "[r]egardless of whether the [survivor's asset] transfers were made for the purpose of avoiding the testamentary disposition, the agreement did not restrict [the survivor] from disposing of the assets as he saw fit." *Id*. at 591.

In the present case, nothing in the trust or other testamentary documents restricted the surviving settlor-trustee from disposing of trust assets as the surviving settlor-trustee deemed appropriate. Indeed, the trust specifically authorized Bill, as the surviving settlor-trustee, to engage in self-dealing, to distribute trust assets in cash or in kind, to deal in real estate, and to execute any instruments the trustee considered appropriate to carry out these powers. The trust agreement must be enforced as written. *Raymond Estate*, 483 Mich at 52; *Leix Estate*, 289 Mich App at 590-591; *Reisman Estate*, 266 Mich App at 527. The trial court correctly ruled that defendant was entitled to summary disposition regarding plaintiff's action to quiet title with respect to the Airport Road property.

III. THE UNDUE-INFLUENCE CLAIM

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Maiden*, 461 Mich at 118. A trial court properly grants the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Leix Estate*, 289 Mich App at 577.

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion, which occurs when the court's decision falls outside the range of principled outcomes. *Yoost v Caspari*, 295 Mich App 209, 219-220; 813 NW2d 783 (2012).

B. DISCUSSION

We affirm the trial court on this issue because plaintiff failed to produce any evidence creating a material question of fact that either the Lady Bird deed or the last will and testament was the product of defendant's undue influence over the free will of Bill Brown. The trial court also correctly ruled that no evidence was presented to establish a confidential or fiduciary relationship between Bill Brown and defendant so as to invoke the presumption of undue influence with respect to the documents executed on February 10, 2012. Therefore, the trial court properly granted defendant summary disposition and did not abuse its discretion by denying plaintiff's motion for reconsideration.

The party alleging undue influence in the execution of a testamentary instrument must present evidence "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). Proof of motive, opportunity, or even the ability to control the grantor is not sufficient to establish undue influence in the absence of affirmative proof that it was exercised. *Id.*; *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003). Plaintiff presented no evidence to the trial court that defendant had exerted undue influence over Bill Brown, and

on appeal, plaintiff points to none. Indeed, the affirmative evidence shows that Bill Brown's actions on February 10, 2012, in his individual capacity and as the surviving settlor-trustee of the Bill and Dena Brown trust, were Bill Brown's free and voluntary choice. Further, no evidence was presented that defendant had influenced Bill Brown to create joint bank accounts with her, to execute a new will naming defendant as his personal representative and beneficiary, to name defendant his attorney-in-fact for both general purposes and healthcare decisions, or to execute the Lady Bird quitclaim deed at issue.

Because plaintiff bore the ultimate burden of proof and failed to produce any evidence to raise a material question of fact regarding the elements of undue influence, the trial court properly granted summary disposition to defendant on this claim. *Kar*, 399 Mich at 538 ("The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout trial."); *Leix Estate*, 289 Mich App at 577 (summary disposition is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law). Plaintiff's main assertion of error regarding the trial court's grant of summary disposition is that the trial court failed to consider that the circumstances raised a presumption of undue influence because there was evidence of a confidential or fiduciary relationship between Bill Brown and defendant. This argument is without merit.

A presumption of undue influence exists when evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary or an interest represented by the fiduciary benefits from a transaction, and (3) that the fiduciary had an opportunity to influence the

grantor's decision in the transaction. *Kar*, 399 Mich at 537. Even when the presumption arises, the ultimate burden of proving undue influence remains on the party alleging that it occurred. *Id*. at 538. But the presumption satisfies the burden of persuasion, so if a party opposing the allegation of undue influence "fails to offer sufficient rebuttal evidence," then the party alleging undue influence will have met its burden of persuasion, i.e., its burden of showing the occurrence of undue influence. *Id*. at 542. Generally, the fact-finder must assess whether sufficient evidence has been presented to rebut a presumption of undue influence. *In re Peterson Estate*, 193 Mich App 257, 262; 483 NW2d 624 (1992).

Plaintiff identifies no evidence of a confidential or fiduciary relationship between Bill Brown and defendant that existed before the execution of the questioned documents. Instead, plaintiff asserts a bootstrap argument that conflates the fact that the grant of a power of attorney will create a fiduciary relationship, citing *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002), with the general evidentiary principle that subsequent acts may be circumstantial evidence regarding earlier events, citing *In re Persons Estate*, 346 Mich 517, 532; 78 NW2d 235 (1956) and *Walts v Walts*, 127 Mich 607, 610; 86 NW 1030 (1901). Plaintiff contends that Bill Brown's creating a fiduciary relationship is sufficient to raise a question of fact regarding undue influence with regard to the execution of contemporaneous or prior documents. This argument fails.

First, plaintiff cites no authority for the premise of his argument that the creation of fiduciary relationship retroactively extends a presumption of undue influence to acts that took place before the fiduciary

relationship was created. Moreover, the cases plaintiff cites do not so hold. *Persons Estate*, 346 Mich at 532, holds only that the conduct of the chief beneficiary of a will before or after the will's execution may be relevant to whether undue influence was exerted in procuring the making of the will. The case says nothing about a presumption of undue influence applying retroactively to times before the creation of a fiduciary relationship. Similarly, *Walts* states the unremarkable evidentiary principle that subsequent events may be circumstantially relevant evidence to explain earlier conduct. Thus, the evidence relates to prove a fact in existence at an earlier time. Specifically, the Court stated that "evidence showing acts of undue influence at a date subsequent to the execution of the will is competent, in connection with other facts and circumstances, in support of the charge of undue influence exerted at the earlier date[.]" *Walts*, 127 Mich at 610. This case also does not hold that a presumption of undue influence may be applied retroactively to times before the creation of a fiduciary relationship. An issue is deemed abandoned when a party fails to cite any supporting legal authority for its position. *Prince*, 237 Mich App at 197.

Second, our Supreme Court, in discussing the elements necessary to establish a presumption of undue influence, clearly states that for the presumption to be "brought to life," i.e., to apply, evidence must be introduced that would establish "the existence of a confidential or fiduciary relationship between the grantor and a fiduciary . . . ." *Kar*, 399 Mich at 537. Stated otherwise, the presumption of undue influence cannot be applied to questioned documents that were created before "the existence of a confidential or fiduciary relationship." Thus, the creation of a fiduciary relationship cannot shift the burden of persuasion with respect

to undue influence that is alleged to have been exerted before the fiduciary relationship was created. Because the burden of production never shifted in this case from plaintiff to defendant with respect to the questioned documents, and plaintiff failed to present evidence to create a question of fact as to whether the questioned documents were the product of undue influence, the trial court properly granted defendant summary disposition. *Id*. at 539-540; *Leix Estate*, 289 Mich App at 577.

Even if we were to assume that a presumption of undue influence arising from the creation of the power of attorney could be applied retroactively, we recognize that the presumption creates only a permissible inference that may be rebutted by the introduction of evidence to the contrary. *Kar*, 399 Mich at 541. The ultimate burden of proof regarding undue influence remains with the party who alleges that it occurred. *Id*. at 539. In the present case, no evidence was presented of undue influence and, in fact, the evidence showed that Bill Brown's actions were the result his own free will. So, even if a presumption of undue influence applied retroactively stemming from the creation of a power of attorney in defendant, the presumption was rebutted such that a reasonable trier of fact could only conclude that the questioned documents were not the product of undue influence. They were the result of Bill Brown's free will. See, e.g., *id*. at 537, 541, 543-544 (a directed verdict is appropriate when a defendant's rebuttal evidence overcomes the presumption).[4] Therefore, considering the evidence submitted to the trial

[4] The standard applicable to directed verdicts is the same as that for a motion under MCR 2.116(C)(10), i.e., "whether reasonable minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact." *Skinner v Square*

court, even if a presumption of undue influence existed at the time the questioned documents were created, the evidence presented to the trial court, giving the benefit of reasonable doubt to plaintiff, does not leave open a question of undue influence on which reasonable minds might differ. *Id*. at 543-544; *West*, 469 Mich at 183.

Plaintiff also argues that the trial court erred by granting summary disposition to defendant regarding undue influence because it relied on "conclusory opinion" testimony of then attorney Benjamin Bolser and bank employee Yvonne Currie. Both witnesses testified in their depositions that they believed Bill Brown was acting of his own volition when executing the questioned documents and that they saw nothing to indicate otherwise. A trial court may only consider documentary evidence on a motion for summary disposition under MCR 2.116(C)(10) "to the extent that the content or substance would be admissible as evidence . . . ." MCR 2.116(G)(6); see also *Maiden*, 461 Mich at 121. Plaintiff's argument in this regard lacks merit. To the extent Bolser's and Currie's testimony amounted to lay opinions, it would be substantively admissible because it was "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. "Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996).

In sum, the trial court properly granted defendant summary disposition regarding plaintiff's claim of un-

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D Co, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

due influence with respect to the questioned documents. *Leix Estate*, 289 Mich App at 577. Furthermore, the trial court also did not abuse its discretion by denying plaintiff's motion for reconsideration. *Yoost*, 295 Mich App at 219-220.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

MARKEY, P.J., and STEPHENS and RIORDAN, JJ., concurred.

In re JAJUGA ESTATE

Docket No. 322522. Submitted October 8, 2015, at Petoskey. Decided October 20, 2015, at 9:05 a.m.

Susan Veith filed a petition in the Clare County Probate Court objecting to a final account and seeking to be awarded exempt property under MCL 700.2404. Veith was the sole surviving child of the decedent, Shelby J. Jajuga, who died testate. Her will directed that her estate be divided equally between named beneficiaries. The will specifically disinherited Veith. Joann Chelenyak, the personal representative of Jajuga's estate, had refused to pay Veith the exempt-property allowance, contending that she was not entitled to it because of the disinheriting language in the will. The court, Marco S. Menezes, J., ruled that Veith was entitled to the exempt property that she had requested, concluding that a testator may not preclude a child from taking exempt property through a disinheriting provision in a will. Chelenyak appealed.

The Court of Appeals *held*:

Under MCL 700.2404, the decedent's surviving spouse is entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed $10,000 more than the amount of any security interests to which the property is subject. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. MCL 700.3101 provides that an individual's power to leave property by will is subject to the restrictions and limitations contained in the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. MCL 700.3101 further states that upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will, subject to the rights of creditors, the surviving spouse's elective share, administration, certain allowances, and exempt property. Thus, a decedent's intended distribution of estate property is limited by the provisions of the exempt-property statute. Under the plain language of the exempt-property statute and reading that statute as a whole and in context, the word "entitled" means having a legal right to exempt property. There is no requirement that a child actually receive a benefit or share of the estate in order to claim

exempt property. A child's ability to claim exempt property is separate from, independent of, or supplemental to any benefit or share received—or not received—under a will. Given the existence of a right to exempt property under MCL 700.2404 that is separate from any property devised under the will, the language in the decedent's will that generally disinherited Veith was not sufficient under MCL 700.2404 to eliminate her statutory right to exempt property because the disinheriting language did not refer to Veith's statutory rights. This reading of the statute is consistent with caselaw from other jurisdictions that have considered similar statutory language. Chelenyak was correct that MCL 700.2205 expressly provides for the waiver of exempt property by a surviving spouse and that no other provision allows for such a waiver by an adult child. However, given the legal differences between a marital relationship and a parent-child relationship, the possibility of waiver by a spouse under MCL 700.2205 does not establish, contrary to Chelenyak's assertion, that a decedent's surviving spouse has a vested right to exempt property while a decedent's child has only an unvested right. In light of the significant consequences that creating different rights for surviving spouses and adult children would have, the Legislature would have expressly distinguished between the rights of those groups if it had intended for that distinction to exist. In light of the plain language of MCL 700.2404 and caselaw from other jurisdictions interpreting provisions similar to those in EPIC, Veith had a statutory right to exempt property under MCL 700.2404 that was not eliminated by the disinheriting language in Jajuga's will, which included no expression of intent regarding Veith's statutory right to exempt property.

Affirmed.

WILLS — DISINHERITING PROVISIONS — CHILD'S RIGHT TO EXEMPT PROPERTY.

Under the exempt-property statute, a decedent's surviving spouse is entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed $10,000 more than the amount of any security interests to which the property is subject; if there is no surviving spouse, the decedent's children are entitled jointly to the same value; a decedent's intended distribution of estate property is limited by the provisions of the exempt-property statute, and a child's ability to claim exempt property is separate from, independent of, or supplemental to any benefit or share received—or not received—under a will; a general disinheritance provision in a will is not sufficient to eliminate a child's statutory right to exempt property (MCL 700.2404).

Valerie Kutz-Otway, PLC (by *Valerie Kutz-Otway*), for Susan Veith.

Martineau, Hackett, Romashko, O'Neil & Klaus, PLLC (by *Jeffrey J. Klaus*), for Joann Chelenyak.

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

RIORDAN, J. Respondent, Joann Chelenyak, who is the personal representative of the estate of Shelby Jean Jajuga, appeals as of right a probate court order granting the petition for exempt property filed by petitioner, Susan P. Veith. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

The relevant facts are undisputed in this case. Petitioner is the sole surviving child of the decedent, Shelby Jean Jajuga. The decedent drafted her last will and testament on January 16, 2002, under which her estate was to be divided in equal parts among three beneficiaries: (1) Mike and "Joanne Chelenysk,"[1] who constituted a single, joint beneficiary, (2) Jeanette Mullins, and (3) Sherry Snyder. The decedent further directed that petitioner and the decedent's other children, who were still living at the time, were to "inherit nothing from [her] estate." The decedent explained in the will that her decision to disinherit her children was "not because of any lack of love and affection I hold toward them but because they have either received compensation in advance of my death or because I do not believe it would be in their best interest that they inherit." The decedent later filed a codicil to her will, appointing respondent as personal representative and

[1] The will appears to have misspelled the name of beneficiary and personal representative, Joann Chelenyak.

directing that her estate be divided equally between two, rather than three, named beneficiaries. The codicil reaffirmed the remainder of the will and did not alter the provision that disinherited petitioner.

Following the decedent's death, petitioner filed an objection to the final account "on the basis that the Personal Representative has refused to pay Petitioner the exempt property allowance as required by MCL 700.2404 . . . ." Petitioner asked the court to award the exempt property that she had selected from the estate (i.e., a car valued at $4,500, a tractor valued at $2,500, and $7,000 in cash) or, in the alternative, $14,000 in cash, plus $1,000 in attorney fees. In response, respondent contended that petitioner was not entitled to exempt property because she was specifically disinherited under the will.

After holding a hearing on petitioner's objection to the final account and requesting supplemental briefing from the parties, the probate court held, as an issue of first impression in Michigan, that petitioner was entitled to the exempt property that she had requested. In light of the statutory language of MCL 700.2404, other provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., and cases from other jurisdictions construing similar statutory language, the court concluded that a testator cannot preclude a child from taking exempt property through a disinheriting provision in a will. The Court found that the meaning of "entitled" as used in MCL 700.2404 was ambiguous, but concluded, based on the definition of "entitle" in *Black's Law Dictionary* (9th ed), that the Legislature intended to establish a legal right to exempt property under MCL 700.2404 for a surviving spouse or the children of a decedent in the absence of a surviving spouse. In support of its conclu-

sion that the word "entitled" referred to a legal right, the court found that the phrase "in addition to" used in MCL 700.2404(3) means "supplemental" and, therefore, did not establish a condition precedent that a child must be eligible to receive a distribution from the estate in order to claim exempt property.

The court acknowledged respondent's argument that the statute does not expressly " 'require exempt property to be distributed to an adult child in contradiction to the express language' " of the will, but it further noted that the statute does not directly "*prohibit* exempt property from being distributed" when a child has been disinherited, concluding that the Legislature would have included such a provision if it had intended to implement that limitation. The court also recognized that a semantic difference exists between an "allowance" and an "exemption" under EPIC, but held that the distinction was not dispositive with regard to the construction of "entitled," noting that (1) both an allowance and an exemption can constitute a right, (2) Michigan caselaw has traditionally recognized that allowances are rights and personal privileges, and (3) the similarity between MCL 700.2402, MCL 700.2403, and MCL 700.2404 clearly indicated that the Legislature intended for those provisions to operate in a parallel manner. Additionally, the court rejected respondent's argument that interpreting the exempt-property provision as a right would conflict with MCL 700.2102(2) and MCL 700.2302(2)(a), or render those provisions inconsequential. The court also held that the public policy underlying the exempt-property statute was the protection of spouses and children, and that the statute was a remedial statute that should be liberally construed in favor of those benefitted under the statute. Finally, the court con-

cluded that the rights of surviving children to exempt property are equal to those of a surviving spouse.

II. STANDARDS OF REVIEW

This Court reviews de novo an issue of statutory interpretation as a question of law. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, "appeals from a probate court decision are on the record, not de novo." *Id*., citing MCL 700.1305; MCL 600.866(1); MCR 5.802(B)(1); *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999). We review the probate court's factual findings for clear error and its dispositional rulings for an abuse of discretion. *Id*. A "court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *Id*.

III. WHETHER A DECEDENT MAY LIMIT OR MODIFY A SURVIVING CHILD'S CLAIM TO EXEMPT PROPERTY UNDER MCL 700.2404

On appeal, respondent asserts that the probate court erred by granting petitioner's claim of exempt property. The gravamen of respondent's arguments is that a decedent may—through a provision that expressly disinherits a child under a will—eliminate an adult child's claim to exempt property under MCL 700.2404 when there is no surviving spouse. On the facts of this case, we disagree and conclude that the disinheriting language in the decedent's will did not eliminate petitioner's statutory right to exempt property under MCL 700.2404.

A. APPLICABLE LAW

This is an issue of first impression under Michigan law, which requires this Court to interpret

MCL 700.2404 in the context of EPIC.[2] We restated the following principles of statutory interpretation in *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013):

> The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion. The courts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another. [Quotation marks and citations omitted; alteration in original.]

MCL 700.1201 delineates specific rules of construction that should be applied when interpreting EPIC:

> This act shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:

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[2] EPIC is modeled on the Uniform Probate Code. *In re Sprenkle-Hill Estate*, 265 Mich App 254, 259; 703 NW2d 191 (2005).

(a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.

(b) To discover and make effective a decedent's intent in distribution of the decedent's property.

(c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.

(d) To make the law uniform among the various jurisdictions, both within and outside of this state.

MCL 700.2404 pertains to exempt property. It states:

(1) The decedent's surviving spouse is also entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed $10,000.00 more than the amount of any security interests to which the property is subject. If there is no surviving spouse, the decedent's children are entitled jointly to the same value.

(2) If encumbered assets are selected and the value in excess of security interests, plus that of other exempt property, is less than $10,000.00, or if there is not $10,000.00 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $10,000.00 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to assets to make up a deficiency of exempt property abates as necessary to permit payment of all of the following in the following order:

(a) Administration costs and expenses.

(b) Reasonable funeral and burial expenses.

(c) Homestead allowance.

(d) Family allowance.

(3) The rights under this section are in addition to a benefit or share passing to the surviving spouse or chil-

> dren by the decedent's will, unless otherwise provided, by intestate succession, or by elective share. The $10,000.00 amount expressed in this section shall be adjusted as provided in section 1210.

As a preliminary matter, we acknowledge respondent's assertion that the primary role of the court when interpreting a will is to ascertain the intent of the testator and, if permissible under the law, effectuate that intent: "In will cases the primary rule of construction and the primary function of courts is to ascertain from the four corners of a will the intent of the testator and, if legally possible, that intent must prevail." *Hay v Hay*, 317 Mich 370, 397; 26 NW2d 908 (1947); see also *Foster v Stevens*, 146 Mich 131, 136; 109 NW 265 (1906). In the instant case, however, we are concerned with interpreting and applying a statute, not discerning the decedent's testamentary intent. Nevertheless, the rule of construction emphasized by respondent is consistent with the rule of construction applicable to EPIC under MCL 700.1201(b), i.e., to liberally construe and apply the act in a way that promotes the discovery and execution of the decedent's intent in the distribution of the decedent's property. There is no dispute in this case that the decedent intended that petitioner would inherit nothing from her estate.

However, it is important to recognize that MCL 700.3101 provides:

> *An individual's power to leave property by will*, and the rights of creditors, devisees, and heirs to his or her property, *are subject to the restrictions and limitations contained in this act to facilitate the prompt settlement of estates. Upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will* or to those indicated as substitutes for them in cases involving lapse, disclaimer, or other circumstances affecting devolution of a testate es-

> tate, or in the absence of testamentary disposition, to the decedent's heirs or to those indicated as substitutes for them in cases involving disclaimer or other circumstances affecting devolution of an intestate estate, *subject to* homestead allowance, family allowance, and *exempt property*, to rights of creditors, to the surviving spouse's elective share, and to administration. [Emphasis added.]

Accordingly, it is apparent that effectuating a decedent's testamentary intent should not be our sole focus in construing MCL 700.2404, as EPIC clearly provides that an individual's power to leave property by will is subject to the exempt property provisions of MCL 700.2404.

Thus, we reject respondent's argument that "[i]t is counterproductive to permit the decedent to disinherit an adult child on one hand and then grant the disinherited adult child rights in exempt property greater than the right of the decedent to devise his or her property." Instead, it appears that MCL 700.3101 specifically contemplates and allows that result. Likewise, we do not agree that "the statutory language is silent as to whether or not [an] adult child's 'rights' to exempt property ha[ve] a first priority over the decedent's devise or other intended distribution from the estate." Again, MCL 700.3101 expressly provides that a decedent's devises are *subject to* exempt property, which clearly indicates that a decedent's intended distribution of estate property is limited by the provisions of the exempt-property statute. Therefore, given that the language of an act is the most reliable evidence of the Legislature's intent, *Book-Gilbert*, 302 Mich App at 541, we reject respondent's claim that there is no statutory support for the court's ruling that exempt property may be distributed to an adult child in contradiction to the express language disinheriting the child under the will. For the same reasons, we reject

respondent's public policy claims regarding whether the exempt-property provision of MCL 700.2404 has priority over a decedent's power to devise his or her property in light of the unambiguous language in MCL 700.3101.

Additionally, respondent contends that resolution of this appeal requires the construction of MCL 700.2101 because MCL 700.2101(2) and MCL 700.2404 appear to conflict, and construing MCL 700.2404 in a way that establishes a right to exempt property that cannot be eliminated by express testamentary language would render MCL 700.2101(2) inconsequential or trivial. We disagree and conclude that the language of MCL 700.2101(2) is inapposite when determining the nature of an adult child's entitlement to exempt property under MCL 700.2404.

MCL 700.2101 provides:

> (1) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act, except as modified by the decedent's will.
>
> (2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent that passes by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

Whereas MCL 700.2101 governs property distributions when the decedent died intestate or did not provide for the distribution of part of the estate in the will, MCL 700.2404 is applicable to both intestate and testate estates. See MCL 700.2404(3). It is implicit in the plain language of MCL 700.2404(3) that a distribution of

exempt property does not constitute the passage of property by intestate succession. Instead, given the clear language that rights to exempt property under MCL 700.2404 are *in addition to* any benefit or share that passes by intestate succession, it is evident that exempt property passes by a means other than intestate succession. This conclusion is further supported by the fact that MCL 700.3101 states that the passage of a decedent's property through intestacy is "*subject to* homestead allowance, family allowance, and *exempt property*, to rights of creditors, to the surviving spouse's elective share, and to administration." (Emphasis added.) In addition, a decedent may limit the right of an individual who would have taken under the laws of intestate succession pursuant to MCL 700.2101 without necessarily affecting the right of a surviving spouse or child to exempt property under MCL 700.2404.

In this case, there is no dispute that the decedent died testate, and that her will provided that her entire estate was to be divided equally between her designated beneficiaries. Because the decedent's entire estate was "effectively disposed of" by her will, MCL 700.2101 is not applicable. See MCL 700.2101(1).[3] Likewise, for the foregoing reasons, we reject respon-

[3] While John Martin, reporter for the EPIC drafting committee of the Probate and Estate Planning Section of the State Bar of Michigan, in a "Reporter's Comment" concerning MCL 700.2402 cites MCL 700.2101(2) as a provision that "point[s] to the fact that a decedent could omit a child not only from taking anything under the decedent's will but also from receiving allowances as well," the comment later states that "it is unclear whether the decedent may modify or eliminate these exemptions and allowances by will." Martin & Harder, *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE, February 2015 update), p 79. The plain language of the statutes leads us to conclude that MCL 700.2101(2) is not dispositive in the instant case. See also MCL 700.2205 (referring to a share passing by intestate succession and exempt property as two separate rights).

dent's claim that a conflict arises between MCL 700.2101 and MCL 700.2404 if a disinherited child is permitted to claim exempt property, as the statutes pertain to different types of property transfers.

B. THE LANGUAGE OF MCL 700.2404

1. THE MEANING OF "ENTITLED"

Respondent contends that the probate court erred by finding that the Legislature's use of the term "entitled" in MCL 700.2404(1) establishes that a decedent's children have a statutory right to exempt property when there is no surviving spouse. We disagree.

"Entitled" is not defined by statute. "When the Legislature has not defined a statute's terms, we may consider dictionary definitions to aid our interpretation." *Autodie LLC v Grand Rapids*, 305 Mich App 423, 434; 852 NW2d 650 (2014). According to *Merriam-Webster's Collegiate Dictionary* (11th ed), "entitle" means "to furnish with proper grounds for seeking or claiming something[.]" Similarly, *Black's Law Dictionary* (10th ed) defines "entitle" as "[t]o grant a legal right to or qualify for." In considering both definitions, we conclude that the plain meaning of "entitled" in this context is having a legal right to exempt property, or meeting the qualifications to claim exempt property as a matter of law.

Respondent, however, asserts that "[t]he plain and ordinary meaning of 'entitled' is one of eligibility as to the right of priority" and does not establish an "absolute right to the exempt property . . . ." Construing "entitled" in the manner advocated by respondent is inconsistent with the context of the word "entitled" in the statute. MCL 700.2404(3) refers to a surviving spouse's entitlement (or, if there is no surviving

spouse, the entitlement of the decedent's children) to the property listed in the statute as "rights." The statute does not indicate that these rights are merely procedural rights of priority that arise once a child is eligible to claim exempt property. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("In seeking meaning, words and clauses will not be divorced from those which precede and those which follow.") (quotation marks and citation omitted); *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009) ("[W]hen considering the correct interpretation, [a] statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.") (citations omitted). Instead, the statutory language first describes the property to which a surviving spouse (or, if there is no surviving spouse, the decedent's children) is *entitled* and subsequently states that *those rights themselves* "have priority over all claims against the estate," not that the rights only constitute rights of priority. MCL 700.2404. Furthermore, the fact that the devises in a testator's will are *subject to* exempt property pursuant to MCL 700.3101 further suggests that surviving spouses or children have a legal right to—not just a right of priority as to—exempt property under MCL 700.2404. Therefore, in reading EPIC as a whole, see *G C Timmis*, 468 Mich at 421; *Book-Gilbert*, 302 Mich App at 541, we conclude that the term "entitled" does, in fact, establish a right in a decedent's child to claim exempt property.[4]

[4] Although we agree with respondent that the right to exempt property may be restricted to a certain extent, as it must abate as

This conclusion is supported by the comments of the reporter for the EPIC drafting committee of the State Bar of Michigan. "While not binding, the reporter's comments concerning EPIC may aid in the interpretation of a statute or rule." *In re Bittner Conservatorship*, 312 Mich App 227, 242; 879 NW2d 269 (2015) (quotation marks and citation omitted). The reporter's comment concerning MCL 700.2404 provides, in relevant part: "Like the homestead allowance, the exempt property allowance does not need to be elected. *The surviving spouse is (or children are) entitled to the allowance, and the personal representative has an obligation to pay it*." Martin & Harder, *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE, February 2015 update), p 82 (emphasis added). Likewise, the reporter's comment concerning MCL 700.2402, which is cross-referenced in the comment regarding MCL 700.2404, states, in pertinent part:

> There is no statutory or court rule provision requiring the personal representative to give notice of the homestead allowance (or exempt property allowance) to the surviving spouse (or children if there is no surviving spouse). None is needed. These allowances are not elective. Subject to possible modification by the testator or spousal agreement (as explained below), *they stand as statutorily mandated transfers of a portion of the decedent's property*. [*Id*. at 78.]

Therefore, for the reasons stated, we conclude that the Legislature's use of the word "entitled" in MCL

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necessary for the costs, expenses, and allowances listed in MCL 700.2404(2), this fact does not preclude a finding that a legal right exists. Furthermore, as discussed later in this opinion, courts from other jurisdictions that have interpreted strikingly similar statutory language have concluded that the right to exempt property is "absolute." See *In re Peterson Estate*, 254 Neb 334, 340-341; 576 NW2d 767 (1998); *In re Wagley Estate*, 760 P2d 316, 318 (Utah, 1988); *In re Dunlap Estate*, 199 Mont 488, 490-492; 649 P2d 1303 (1982).

700.2404(1), especially when read in context, establishes a statutory right to a mandatory transfer of exempt property, not merely a right of priority.[5]

2. THE MEANING OF "IN ADDITION TO" AND "UNLESS OTHERWISE PROVIDED"

Respondent argues that a plain reading of MCL 700.2404 reveals a preliminary assumption that an adult child must actually receive a benefit or share of the estate in order to claim exempt property. We disagree.

The plain language of the statute states that "[t]he rights" to which a surviving spouse, or a decedent's child, is entitled under MCL 700.2404 "*are in addition to* a benefit or share passing to the surviving spouse or children by the decedent's will, *unless otherwise provided*, by intestate succession, or by elective share." MCL 700.2404(3) (emphasis added). As the probate court concluded, we hold that the plain meaning of this language is that a child's ability to claim exempt property is *separate* from, *independent* of, or *supplemental* to any benefit or share received—or not received—under a will. We discern no indication of a condition precedent or a requirement that a child must receive a devise under a will in order to claim exempt property. This conclusion is consistent with the fact

[5] Because we find that MCL 700.2404 establishes a statutory right regardless of whether the statute is remedial in nature, we need not consider respondent's argument that the trial court erroneously relied on a conclusion that MCL 700.2404 was a remedial statute in determining whether petitioner had a statutory right to exempt property. Nevertheless, we note that Michigan courts have distinguished remedial statutes from statutes that confer substantive rights. See, e.g., *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001); *Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954).

that a decedent's devises under a will are *subject to* exempt property, MCL 700.3101, which indicates that the operation of the exempt-property statute is separate and distinct from the specific devises of a will. This conclusion is also consistent with the decisions of other state courts interpreting language strikingly similar to MCL 700.2404. See Part III(C) of this opinion.

Additionally, respondent argues that language expressly stating that an adult child is to receive nothing under a will is sufficient to trigger the "unless otherwise provided" language under MCL 700.2404, such that petitioner was not entitled to exempt property under MCL 700.2404 given the disinheriting language in the will. We disagree.

Given the existence of a right to exempt property under MCL 700.2404 that is separate from any property devised under the will, we conclude that the language in the decedent's will that generally disinherited petitioner was not sufficient under MCL 700.2404 to eliminate petitioner's *statutory right* to exempt property because the disinheriting language included no reference to petitioner's statutory rights.[6]

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[6] Analogously, the reporter's comment regarding MCL 700.2404 provides, "A specific devise of personal property to the spouse or children without a further indication that it replaces this exemption should not be interpreted as within the phrase 'unless otherwise provided.' " Martin & Harder, pp 81-82. The reporter's comment in regard to MCL 700.2402 also states the following with regard to the "unless otherwise provided" language in that statute, ultimately concluding that it is unclear whether a decedent may modify or eliminate an exemption by will:

> The phrase "unless otherwise provided" in the last sentence of § 2402 permits a testator to stipulate that the allowance is to be treated as part of the share given by will to the spouse (or other recipient). The allowances in §§ 2402, 2403, and 2404, [MCL 700.2402, MCL 700.2403, and MCL 700.2404], are certainly intended to offer some economic protection to the surviving

C. CASELAW FROM OTHER JURISDICTIONS

Our analysis is consistent with that in cases from other jurisdictions that have considered statutes strikingly similar to MCL 700.2404.[7] In *In re Dunlap Estate*, 199 Mont 488, 489; 649 P2d 1303 (1982), the decedent, whose husband predeceased her, executed a will in which she specifically disinherited her son, who sought to claim exempt property. "The sole issue before [the

> spouse and to children when they are eligible. May the decedent, however, stipulate in his or her will that one or more of the allowances not be paid? In other words, can a spouse or a child be omitted from coverage by these allowances? It seems clear that a spouse may not be denied these allowances through unilateral action by the decedent. Section 2205, MCL 700.2205, appears to state the only methods by which the spouse may be excluded from receiving the allowances. All require consent of the spouse. Other provisions point to the fact that a decedent could omit a child not only from taking anything under the decedent's will but also from receiving allowances as well. These sections are MCL 700.2101(2) (permitting exclusion from receiving an intestate share), and § 2302, MCL 700.2302 (providing no share for a child who is deliberately or inadvertently excluded from a will, except in very limited situations). The inclusion of dependent children in the coverage of §§ 2402 and 2403 arguably is based on a public policy of providing a minimal benefit in all events for the one or those who have an economic need. Because children who may take exempt property under § 2404 need not be dependent children, their inclusion may be based on simple fairness, not economic necessity. *Whatever the policy reason for including children within the coverage of these provisions, it is unclear whether the decedent may modify or eliminate these exemptions and allowances by will.* [*Id*. at 78-79 (emphasis added).]

[7] "Cases from other jurisdictions, although not binding, may be persuasive." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 529 n 2; 791 NW2d 724 (2010). We find this caselaw especially significant given that MCL 700.1201 mandates that we liberally construe and apply EPIC in order to "make the law uniform among the various jurisdictions, both within and outside of this state." MCL 700.1201(d). Although the statutes construed in the cases from other jurisdictions cited in this opinion were subsequently amended, we find that interpreting MCL 700.2404 in a manner analogous to the interpretations of the similar, albeit prior, versions of the statutes advances the uniformity and predictability of the law.

court was] whether a child specifically disinherited by will may take under [Mont Code Ann 72-2-802] which provides exempt property for certain heirs." *Id*. At the time, Montana's exempt-property statute provided:

> (1) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value [in] excess of security interests, plus that of other exempt property, is less than $3,500 or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value.
>
> (2) Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance.
>
> (3) These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. [*Id*. at 489-490, quoting Mont Code Ann 72-2-802 (now Mont Code Ann 72-2-413) (emphasis omitted).]

As in the instant case, the estate argued "(1) that [the] testator's intent governs the above section, and (2) that the statutory language in subsection (3) above, 'unless otherwise provided,' includes the will of the testator by disinheriting the son and hence the son cannot be the recipient of exempt property." *Dunlap*

Estate, 199 Mont at 490 (emphasis omitted). Like us, the Montana Supreme Court disagreed and affirmed the district court's order granting the disinherited son's petition for exempt property. *Id*. at 488-489, 492. The court stated, "We agree . . . that the governing rule in construction or interpretation of a testamentary disposition is the intention of the testator and must prevail; however, that is not our case here." *Id*. at 490 (emphasis omitted). The Court reasoned that the phrase "unless otherwise provided" must be considered in light of the section as a whole and concluded, on the basis of the language of the entire statute and caselaw interpreting a surviving spouse's right to exempt property and the homestead allowance, that either the surviving spouse or the decedent's children have an absolute right to exempt property. *Id*. at 490-492. The court specifically found that "[t]he statute embodies a priority right in the surviving spouse as against the surviving children of the decedent, but does not grant a surviving spouse any greater right to exempt property than the surviving children." *Id*. at 491. Moreover, the Court determined that exempt property assets "are protected from creditors so that property and money can be distributed to those people whom Montana's legislature has determined to protect." *Id*. Further, the Court stated that "[t]he family protection provisions of the Uniform Probate Code"—including the "statutory rights vested in the surviving spouse and certain children" to exempt property and allowances—"were intended by the drafters to protect a surviving spouse and children from disinheritance by a decedent." *Id*. at 491-492.[8] Finally, the court noted, in upholding the

[8] Respondent appears to contest this conclusion by arguing that the trial court erred by failing to distinguish between allowances and exemptions under EPIC, arguing that allowances are separate and distinct from exempt property under EPIC. However, we decline to

child's claim of exempt property, that "the decedent's will did no more than disinherit the child and expressed no intent as to statutory rights." *Id*. at 492. See also *In re Herr Estate*, 460 NW2d 699, 705-706 (ND, 1990) (citing with approval the court's holding and reasoning in *In re Dunlap Estate* and quoting a provision similar to MCL 700.3101 in determining that a child was entitled to exempt property under a statute similar to MCL 700.2404 even though she received nothing under the decedent's will).

Similarly, Nebraska's Supreme Court construed a prior version of its exempt-property statute, which was similar to MCL 700.2404, in order to determine "whether an adult, emancipated son of a testator is entitled to an exempt property allowance of $5,000 pursuant to [Neb Rev Stat] 30-2323 (Reissue 1995) when the will specifically provided that under no circumstance should any share of the testator's estate go to his son." *Peterson Estate*, 254 Neb 334, 335; 576 NW2d 767 (1998). At the time, the exempt-property statute provided:

> In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal

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address this argument because it has no bearing on our construction of the right to exempt property under MCL 700.2404, and respondent expressly concedes that "[t]he issue before this Court is limited only to the Exempt Property provisions under MCL 700.2404, as they apply to a disinherited adult child . . . ." Nevertheless, we note that the reporter's comments concerning these provisions expressly refer to the exempt-property provision as "the exempt property allowance" and further refer to "the allowances" under MCL 700.2402, MCL 700.2403, *and* MCL 700.2404, which strongly suggests that respondent asserts a false distinction. See Martin & Harder, pp 78-83.

> effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than five thousand dollars, or if there is not five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the five thousand dollars value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except for costs and expenses of administration, and except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. *These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share.* [*Id.* at 336-337, quoting Neb Rev Stat 30-2323 (Reissue 1995).]

The court "conclude[d] that the plain and unambiguous language of § 30-2323 creates a statutory right that accrues to the surviving spouse or the surviving children jointly if there is no surviving spouse upon the death of the testator." *Peterson Estate*, 254 Neb at 339. In determining whether "this right is indefeasibly vested or whether it may be abrogated by will," the court considered *Dunlap Estate*, 199 Mont 488, and noted that other jurisdictions allowing a testator to provide for a bequest instead of a statutory allowance have indicated that the testator's intent to do so "must be clear from the language of the will before the court will bar the statutory grant." *Peterson Estate*, 254 Neb at 339-340. The court ultimately held:

> In construing the language of § 30-2323, we conclude that the statutory rights granted therein are vested and

> indefeasible. The clear intent of § 30-2323 is to provide an exempt property allowance, which benefit is "in addition to" any benefits passing to the surviving spouse or surviving children by will, by intestate succession, or by way of elective share. Unless a testator clearly provides in the will that the devises and bequests are in lieu of exempt property, then the spouse or children are entitled to both. [*Id*. at 340.]

Finally, the court wrote:

> If the will of a testator clearly provides otherwise, then an exempt property allowance is not "in addition to" any benefit by will, intestate succession, or elective share. Regardless, the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance.
>
> The county court erred in finding that [the disinherited son] was not entitled to an exempt property allowance. The testator disinherited [the son], but [the son] is entitled to an exempt property allowance in accordance with § 30-2323. [*Id*. at 341.][9]

Even though the Nebraska Legislature amended Neb Rev Stat 30-2323 after the *Peterson Estate* decision was issued to expressly prevent children disinherited under a will from claiming exempt property, we conclude that the reasoning applied by the Nebraska Supreme Court in *Peterson Estate* and the Montana Supreme Court in *Dunlap Estate*, with respect to statutes strikingly similar to MCL 700.2404, confirms that our holding is consistent with the plain

[9] Although the *Peterson Estate* court did not expressly mention the rules of construction in place under the probate code, when the case was decided Nebraska's probate code included rules of construction that were nearly identical to Michigan's rules of construction under MCL 700.1201—most notably, "to discover and make effective the intent of a decedent in distribution of his or her property[.]" Neb Rev Stat 30-2202.

language of MCL 700.2404 as it stands today.[10] Furthermore, cases from other jurisdictions interpreting exempt-property statutes with language similar to MCL 700.2404 in regard to a surviving spouse and a homestead allowance provision similar to MCL 700.2402, which also included entitlement language that mirrors MCL 700.2404, have determined that the statutes unambiguously establish an entitlement or absolute right as a matter of law. See *In re Martelle Estate*, 2001 Mont 194, ¶¶ 21 and 37; 306 Mont 253; 32 P3d 758 (2001); *In re Wagley Estate*, 760 P2d 316, 317-318 (Utah, 1988).[11]

Therefore, in light of the plain language of the statute and caselaw from other jurisdictions interpreting provisions similar to those in EPIC, we hold that petitioner has a statutory right to exempt property under MCL 700.2404 that was not eliminated by the disinheriting language in the decedent's will, which included no expression of intent regarding petitioner's statutory right to exempt property.

D. DISTINCTION BETWEEN RIGHTS OF SURVIVING SPOUSES AND ADULT, NONDEPENDENT CHILDREN

Lastly, respondent contends that the trial court erred by failing to distinguish between the rights of a surviving spouse and the rights of adult, nondependent children in applying MCL 700.2404. She argues, on the basis of language in MCL 700.2205, that the Legisla-

[10] Respondent concedes that an amendment of MCL 700.2404, as was done in Nebraska, would give her the outcome that she seeks in this appeal. But because a legislative fix is not available to her, she would like this Court to rewrite the statute. We decline to do so, as this is a function of the Legislature.

[11] As discussed later in this opinion, we perceive no indication in the statutory text that a qualifying child has less of a right to exempt property than a surviving spouse under MCL 700.2404.

ture did not intend for the rights granted to a surviving spouse under MCL 700.2402 through MCL 700.2404 to be equal to the rights granted to an adult child when there is no surviving spouse. Although we agree that the statutory text supports the conclusion that there is a distinction between the rights of a surviving spouse and the rights of an adult child, we are not persuaded that MCL 700.2205, on its own, demonstrates that the rights of an adult child to exempt property are not vested.

Respondent is correct that MCL 700.2205 expressly provides for the waiver of exempt property by a surviving spouse and that no other provision allows for such a waiver by an adult child. MCL 700.2205 states:

> The rights of the surviving spouse to a share under intestate succession, homestead allowance, election, dower, exempt property, or family allowance may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separate maintenance is a waiver of all rights to homestead allowance, election, dower, exempt property, and family allowance by the spouse in the property of the other and is an irrevocable renunciation by the spouse of all benefits that would otherwise pass to the spouse from the other spouse by intestate succession or by virtue of a will executed before the waiver or property settlement.

Respondent argues that we should infer from this language that a surviving spouse has a vested right to exempt property that cannot be waived without the consent of the spouse, while a nondependent adult child does not have the same vested right, such that his or her consent is not required for his or her right to

exempt property to be modified or eliminated by a decedent's will.

Given the significant legal differences between—and implications of—a marital relationship as opposed to a parent-child relationship, we disagree that the express possibility of waiver "by a written contract, agreement, or waiver signed by the party waiving after fair disclosure" under MCL 700.2205 necessarily establishes that a decedent's surviving spouse has a *vested* right to exempt property while a decedent's adult child does not. Apart from the possibility of spousal waiver established under MCL 700.2205, we discern no indication that the Legislature intended for children to have different or limited rights to exempt property as compared to a surviving spouse. In light of the significant consequences that creating different rights for surviving spouses and children would have, we conclude that the Legislature would have expressly distinguished between the rights of those groups in the text if it had intended for that distinction to exist. Cf. *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269-270; 660 NW2d 97 (2003) (reasoning that the Legislature would have expressed an intention more clearly if it had intended to implement such a provision). It is not the role of the Court to judicially legislate by adding language to a statute, *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997), and this Court may not engraft a limitation of a right, which is not included by the Legislature, "under the guise of statutory construction," see *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 40; 645 NW2d 59 (2002).[12]

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[12] Contrary to respondent's claim, the reporter's comment regarding MCL 700.2205, like us, appears to draw the inference that an adult child's right to exempt property may not be waived:

Therefore, we reject respondent's argument that MCL 700.2205 indicates that an adult child has an inferior right to exempt property compared to a surviving spouse.

IV. CONCLUSION

Although it may have been prudent for the Legislature to specifically prescribe the way in which a statement of a decedent's intent to disinherit a child under a will affects the child's claim to exempt property, especially given that one of the express purposes and policies of EPIC is "[t]o discover and make effective a decedent's intent in distribution of the decedent's property," MCL 700.1201(b), it is not our role to do so. "When the Legislature fails to address a concern in [a] statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Book-Gilbert*, 302 Mich App at 542 (quotation marks and citation omitted).

If the Legislature wished to extend the testator's intent in disinheriting a child to the child's *statutory* right to exempt property, it could have expressly stated that intent in the statute. However, the statute is silent in this regard. Therefore, for the reasons stated in this opinion, we conclude that petitioner has a right

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> This section permits only a spouse to waive allowances and the right to exempt property (as well as other rights). An adult dependent child may be entitled to homestead and family allowances under MCL 700.2402 and [MCL 700.2403]. An adult child may be entitled to an exempt property allowance under MCL 700.2404. *These apparently are rights that may not be waived*. It is uncertain whether they may be modified or eliminated by the decedent's will. [Martin & Harder, p 72 (emphasis added); see also *Bittner Conservatorship*, 312 Mich App at 242.]

to exempt property under MCL 700.2404 that was not eliminated by the disinheriting language in the decedent's will.

Affirmed.

MARKEY, P.J., and STEPHENS, J., concurred with RIORDAN, J.

DELL v CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 322654. Submitted October 13, 2015 at Grand Rapids. Decided October 20, 2015, at 9:10 a.m.

Tina Marie Dell filed a complaint in the Allegan Circuit Court against Citizens Insurance Company of America and Citizens Insurance Company of the Midwest for payment of attendant-care benefits under a no-fault automobile insurance policy covering plaintiff in 1984, the time of the accident that caused her injuries. In response to defendants' initial motion for summary disposition, plaintiff sought leave to amend her complaint to add a claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Defendants contested plaintiff's request to amend her complaint, arguing that an amendment was time-barred by MCL 445.911(7). Plaintiff was permitted to file an amended complaint, defendants failed to answer, and the court, Margaret Zuzich Bakker, J., entered a default judgment. The court denied defendants' motion to set aside the judgment. The court later granted defendants' motion for reconsideration and set aside the default judgment. Defendants filed two motions for summary disposition, one based on the one-year-back rule in MCL 500.3145(1), which was denied, and another under MCR 2.116(C)(8) for failure to state a claim. The court concluded that plaintiff stated a claim under the MCPA and denied defendants' motion for summary disposition under MCR 2.116(C)(8). A jury found that defendants had violated the MCPA and awarded plaintiff $1.7 million in unpaid benefits and $300,000 in damages for mental anguish. Plaintiff sought attorney fees and costs, and defendants filed a motion for judgment notwithstanding the verdict (JNOV). The court granted defendants' motion for JNOV, agreeing with defendants that the jury's verdict on plaintiff's no-fault claim (no expenses had been incurred between the time of trial and one year before plaintiff filed her complaint) established also that plaintiff's claim under the MCPA was time-barred under MCL 445.911(7). The court denied plaintiff's request for attorney fees. Plaintiff appealed, and defendants cross-appealed.

The Court of Appeals *held*:

1. The trial court properly denied defendants' motion for summary disposition for failure to state a claim because conduct occurring during the claims-handling and adjustment process is actionable under the MCPA for the period of time plaintiff claimed payment as long as plaintiff filed her complaint before June 5, 2014. Plaintiff filed her complaint in 2011. MCL 445.904 contains a list of conduct to which the MCPA does not apply. Although language in MCL 445.904 expressly exempted from the purview of the MCPA conduct made unlawful under the Insurance Code, MCL 500.2001 *et seq*., another provision in the same statute provided an exception to the exemption for claims brought under MCL 445.911. In response to appellate decisions interpreting the MCPA and claims under the Insurance Code, the Legislature amended MCL 445.904 to clarify that the MCPA is in no way applicable to conduct made unlawful under the Insurance Code. The Legislature ultimately established that the MCPA does not apply to any claims on or after March 28, 2001, but that it does apply to claims under the Insurance Code if the claims occurred before March 28, 2001, and if a complaint was filed before June 5, 2014. In this case, plaintiff was entitled to benefits that accrued from the time of the accident until March 28, 2001.

2. Even though conduct made a violation by the Insurance Code may be actionable under the MCPA if it occurred before March 28, 2001, and if a complaint was filed before June 5, 2014, that conduct must also constitute a violation of the MCPA. That is, just because conduct is unlawful under the Insurance Code does not make it unlawful under the MCPA. To be actionable under the MCPA, the conduct must be made unlawful by the MCPA itself. In this case, plaintiff alleged actions that qualified as unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. The products and services provided by an insurance company fall within the MCPA's definition of trade and commerce, and include the claims-handling and adjustment process.

3. An insurance company's conduct after the sale of a policy remains within the purview of the MCPA. In this case, the conduct about which plaintiff complained involved defendants' misrepresentation of their obligations under the insurance policy, and it occurred after plaintiff and defendants had completed the transaction that resulted in the sale of the insurance policy to plaintiff. It was irrelevant that defendants' conduct occurred after the sale was completed and in the context of handling a claim under the policy.

4. The trial court improperly granted defendants' motion for JNOV on the basis that plaintiff's claim was barred because the statutory period of limitations had expired. The trial court should not have granted JNOV because defendants waived their right to defend on the basis that the statutory limitations period had expired. An affirmative defense, such as a statute of limitations defense, must be raised in a party's responsive pleading or in a motion for summary disposition filed before the responsive pleading. In this case, defendants did not raise the defense in any responsive pleading; raising the defense in their response to plaintiff's motion to amend her complaint does not qualify as raising the defense in a responsive pleading.

5. A reference to one statute does not constitute a reference to a different statute. In this case, defendants claimed that their reference to the one-year-back rule in MCL 500.3145(1) should have been sufficient to raise the statute of limitations defense contained in MCL 445.911(7). However, the Court concluded that citation to a specific portion of one statute did not even arguably alert defendants to the affirmative defense outlined in another statute.

Affirmed in part, reversed in part, and remanded.

Zebrowski Law (by *Thomas A. Biscup*) and *Bendure & Thomas* (by *Mark R. Bendure*) for plaintiff.

Garan Lucow Miller, PC (by *Daniel S. Saylor*), for defendants.

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

TALBOT, C.J. Plaintiff, Tina Marie Dell, appeals as of right the trial court's order granting the motion of defendants, Citizens Insurance Company of America and Citizens Insurance Company of the Midwest (collectively, Citizens), for judgment notwithstanding the verdict (JNOV). Citizens cross-appeals from an order of the trial court denying its motion for summary disposition under MCR 2.116(C)(8). We affirm the trial court's order denying Citizens' motion for summary disposition, reverse the trial court's order granting JNOV, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of an accident that occurred in 1984. Dell, a pedestrian, was struck by a motor vehicle. She suffered a closed head injury and injuries to her left leg. These injuries significantly impair her ability to walk. Since the accident, Dell has received no-fault benefits from Citizens under a policy issued to her parents, Paula and Larry Chambers. To date, Citizens has paid approximately $1M in benefits to Dell.

The dispute in this matter centers on Citizens' failure to pay attendant care benefits to Dell from the time of her accident through 2011. Dell has been under the care of Dr. Brian Visser since her accident. At trial, Dr. Visser testified that he believed Dell has always needed attendant care. According to Paula Chambers, she contacted Citizens in 1987 to request reimbursement for attendant care she provided to Dell. Citizens denied the request, informing her that no such benefits were available. In April 2011, through her attorney, Dell submitted a written claim for attendant care benefits, attaching to the claim a prescription for attendant care written by Dr. Visser. At that point, Citizens began paying attendant care benefits, including reimbursement for attendant care provided in the year before the 2011 claim was filed.

Dell filed suit on July 28, 2011, seeking unpaid no-fault benefits. On one of Citizens' motions for summary disposition, the trial court ruled that under MCL 500.3145(1), Dell's claim was limited to benefits incurred no more than a year before she filed her complaint. Dell subsequently sought leave to amend her complaint to add a claim under the Michigan Consumer Protection Act (MCPA).[1] Citizens contested

[1] MCL 445.901 *et seq*.

the amendment, arguing that it was time-barred by MCL 445.911(7). The trial court granted leave to amend the complaint after concluding that there was a question of fact regarding whether Dell's MCPA claim was barred by MCL 445.911(7).

After Dell filed her amended complaint, Citizens failed to timely file an answer, and a default judgment was entered. Citizens' motion to set aside the default was denied by the trial court. Citizens filed a motion for reconsideration. Citizens subsequently filed a motion for summary disposition, arguing that under MCL 500.3145(1) and this Court's opinion in *Grant v AAA Mich / Wisconsin, Inc (On Remand)*,[2] Dell's MCPA claim must be limited to expenses incurred no more than one year before Dell filed her complaint.

The trial court first granted reconsideration and set aside the default. The trial court denied Citizens' motion for summary disposition, finding that MCL 500.3145(1) did not apply to Dell's MCPA claim. Citizens then filed a motion under MCR 2.116(C)(8). The motion argued that Dell's amended complaint failed to state a claim under the MCPA because the MCPA did not apply to misconduct that occurs in the claims-handling and adjustment process. The trial court denied the motion, concluding that Dell's complaint stated a claim under the MCPA.

The matter proceeded to trial. With regard to Dell's claim for no-fault benefits, the jury found that Dell had not incurred any allowable expenses under the no-fault act during the period between July 28, 2010 (one year before filing her complaint) and the time of trial. With regard to Dell's MCPA claim, the jury concluded that Citizens had violated the MCPA. The jury awarded

[2] *Grant v AAA Mich / Wisconsin, Inc (On Remand)*, 272 Mich App 142; 724 NW2d 498 (2006).

Dell $1.7 million in unpaid benefits and $300,000 in damages for mental anguish resulting from the violation. After trial, Dell filed a motion seeking attorney fees and costs. Citizens moved for JNOV, arguing that the jury's verdict with respect to the first count established that Dell's MCPA claim was time-barred under MCL 445.911(7). The trial court agreed and granted the motion. Having granted JNOV, the trial court did not consider Dell's request for costs and attorney fees.

On appeal, Dell raises several issues, many of which contest the trial court's decision to grant JNOV. Citizens cross-appeals, arguing that the trial court erred when it concluded that the MCPA applies to misconduct that occurs in the claims-handling and adjustment process. We begin with Citizens' cross-appeal.

II. CROSS-APPEAL

Citizens argues that the trial court erred when it denied Citizens' second motion for summary disposition. We disagree.

A. STANDARD OF REVIEW

Issues of statutory interpretation are reviewed de novo.[3] This Court also reviews de novo a trial court's decision on a motion for summary disposition.[4]

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When

[3] *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 406; 751 NW2d 443 (2008).

[4] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> deciding a motion brought under this section, a court considers only the pleadings.[5]

B. DISCUSSION

The question before this Court is whether the conduct alleged in Dell's amended complaint, all of which occurred in the claims-handling and adjustment process, is actionable under the MCPA. In her amended complaint, Dell alleged the following:

> 25. [Citizens has] engaged in unfair, unconscionable or deceptive conduct in violation of Chapter 20 of the Michigan Insurance Code in its dealings with [Dell] and her family, agents or representatives.
>
> 26. In particular, [Citizens has] violated [its] duties to act honestly and to explain benefits under MCL 500.2006(3) . . . .
>
> 27. [Citizens] also violated [its] obligations under MCL 500.2026, including but not limited to, the duty not to misrepresent facts or coverages, the duty to communicate promptly, the duty to affirm or deny coverage timely, the duty to promptly investigate claims, the duty to effectuate prompt, fair and equitable settlements of claims, the duty not to compel insureds to institute litigation by underpaying, the duty to identify payments and coverage, and/or the duty to explain [the] basis for denial or offer of compromise. MCL 500.2026(1)(a), (b), (e), (d), (f), (g), (j), (n). . . .
>
> 28. [Citizens'] violations of Chapter 20 [of] the Insurance Code constitute unfair, unconscionable or deceptive methods, acts or practices in the conduct of trade or commerce as set forth in the [MCPA] . . . . *See*, e.g., MCL 445.903(1)(a), (c), (e), (n), (s), (x), (bb), (cc). . . .

In sum, Dell alleged several instances of conduct that violated Chapter 20 of the Insurance Code. She further

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[5] *Id*. at 119-120 (quotation marks and citations omitted).

alleged that these violations constituted unfair, unconscionable, or deceptive methods, acts, or practices under the MCPA.

In *Smith v Globe Life Ins Co*, our Supreme Court considered whether a private cause of action against an insurance carrier arising out of the sale of a life insurance policy could be brought under the MCPA.[6] Ultimately, the Court concluded that the plaintiff's MCPA claim could proceed. The Court's decision turned on its interpretation of MCL 445.904(1) and (2). At the time of the Court's decision, these statutes provided, in relevant part:

> (1) This act does not apply to either of the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.
>
> * * *
>
> (2) *Except for the purposes of an action filed by a person under* [MCL 445.911], this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:
>
> (a) Chapter 20 of the insurance code of 1956, . . . [MCL] 500.2001 to [MCL] 500.2093 . . . .[7]

Our Supreme Court explained that MCL 445.904(1)(a) would generally exempt the sale of insur-

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[6] *Smith v Globe Life Ins Co*, 460 Mich 446, 449; 597 NW2d 28 (1999). The contested issue in *Smith* revolved around whether the insurance application accurately described the insured's existing medical conditions. On the insurance application, slash marks had been made in boxes labeled "NO" in response to questions regarding previous medical diagnoses. The plaintiff asserted that these marks were not in the insured's handwriting. See *id*. at 450, 452.

[7] 1993 PA 10 (emphasis added). See also *Smith*, 460 Mich at 462, 466.

ance from the MCPA because such conduct was " 'specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.' "[8] However, the Court held that MCL 445.904(2) "provides an exception to that exemption by permitting private actions pursuant to [MCL 445.911] arising out of misconduct made unlawful by chapter 20 of the Insurance Code."[9] This was because MCL 445.904(2) "exempt[ed] from the MCPA unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by chapter 20 of the Insurance Code," but that exemption was subject to an exception for actions brought under MCL 445.911.[10] Thus, to give effect to the language of both MCL 445.904(1) and (2), the Court held that "the exemptions provided by [MCL 445.904(1)(a)] and [MCL 445.904(2)(a)] are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code."[11] In response to *Smith*, our Legislature amended MCL 445.904 to provide that without exception, the MCPA does not apply to conduct "made unlawful by chapter 20 of the insurance code . . . ."[12] This amendment took effect on March 28, 2001.

The next event of relevance is this Court's decision in *Converse v Auto Club Group Ins Co* (*Converse I*).[13] In

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[8] *Smith*, 460 Mich at 465, quoting MCL 445.904(1)(a).

[9] *Smith*, 460 Mich at 467.

[10] *Id*. at 466-467.

[11] *Id*. at 467.

[12] MCL 445.904(3), as enacted by 2000 PA 432.

[13] *Converse v Auto Club Group Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2011 (Docket No. 293303) (*Converse I*), rev'd in part 493 Mich 877 (2012).

Converse I, the trial court dismissed a plaintiff's claim under the MCPA "based on its determination that the no-fault act provides an exclusive remedy for causes of action arising in a motor vehicle accident context."[14] In a two-to-one decision, this Court affirmed the trial court, but on a different basis. This Court first held that any claims accruing after March 28, 2001, could not be sustained because of the effect of 2000 PA 432.[15] With respect to those accruing before March 28, 2001, this Court explained that such actions "were permitted pursuant to MCL 445.911 of the MCPA arising out of misconduct made unlawful by chapter 20 of the insurance code."[16] However, this Court concluded that any such claim was limited to those "within one year immediately preceding December 2005," the last date a payment was received by the plaintiff.[17] To reach this conclusion, this Court relied on MCL 445.911(7), which provides, in relevant part:

> "[A]n action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date."[18]

This Court reasoned that because the statutory language dictated that the Court apply whichever of the two time periods ended at a later date, the plaintiff's MCPA claim must be limited to claims "within one year immediately preceding December 2005."[19] But because

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[14] *Converse I*, unpub op at 2.

[15] *Id*. at 3.

[16] *Id*.

[17] *Id*.

[18] *Id*., quoting MCL 445.911(7).

[19] *Id*.

any cause of action based on conduct occurring after March 28, 2001, was barred by the amendments to MCL 445.904, the majority concluded that the insurer was entitled to summary disposition.[20]

On October 26, 2012, our Supreme Court peremptorily reversed, in part, this Court's decision in *Converse I*.[21] With regard to MCL 445.911(7), our Supreme Court explained:

> MCL 445.911(7) of the MCPA provides, in pertinent part:
>
> > An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date.
>
> Because plaintiff brought this action within one year of the last payment, plaintiff's action was timely filed and thus plaintiff can seek to recover damages resulting from the methods, acts or practices violative of the MCPA based on conduct by defendant occurring from July 29, 1992 [the date the plaintiff alleged the misconduct began] to March 28, 2001 (the effective date of MCL 445.904(3)).[22]

Our Supreme Court's order in *Converse II* prompted our Legislature to again amend MCL 445.904.[23] MCL 445.904 now reads:

> (3) This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the

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[20] *Converse I*, unpub op at 3-4.

[21] *Converse v Auto Club Group Ins Co*, 493 Mich 877 (2012) (*Converse II*).

[22] *Id*. at 877-878.

[23] 2014 PA 251.

> insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093, if either of the following is met:
>
> (a) The method, act, or practice occurred on or after March 28, 2001.
>
> (b) The method, act, or practice occurred before March 28, 2001. However, this subdivision does not apply to or limit a cause of action filed with a court concerning a method, act, or practice if the cause of action was filed in a court of competent jurisdiction on or before June 5, 2014.[24]

Through its first enacting section, 2014 PA 251 was given retroactive effect and made effective March 28, 2001.[25] In the act's second enacting section, our Legislature explained:

> This amendatory act is curative and intended to prevent any misinterpretation that this act applies to or creates a cause of action for an unfair, unconscionable, or deceptive method, act, or practice occurring before March 28, 2001 that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093, that may result from the decision of the Michigan supreme court in Converse v Auto Club Group Ins Co, No. 142917, October 26, 2012.[26]

Thus, under the most recent amendment to MCL 445.904, a plaintiff generally may not bring a claim under the MCPA alleging harm resulting from an "unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code . . . , MCL 500.2001 to 500.2093 . . . ."[27] However, if the "method, act, or practice" at issue occurred before March 28, 2001, and a complaint was

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[24] MCL 445.904(3)(a) and (b).

[25] 2014 PA 251, enacting § 1.

[26] 2014 PA 251, enacting § 2.

[27] MCL 445.904(3).

filed on or before June 5, 2014, the claim remains viable.[28] The unlawful acts, methods, or practices stated in Dell's complaint were alleged to have occurred before March 28, 2001, and she filed her complaint well before June 5, 2014. Thus, the restrictions stated in MCL 445.904(3) do not apply to her claim.

In Dell's view, this conclusion settles the matter. Relying on *Smith* and *Converse*, Dell takes the position that any conduct that violates Chapter 20 of the Insurance Code is incorporated into the MCPA through MCL 445.904. Citizens, however, argues that *Smith* and the cases that followed do not stand for the proposition that all conduct made unlawful by Chapter 20 of the Insurance Code is actionable under the MCPA. Rather, Citizens argues that to be actionable, the MCPA itself must render that conduct unlawful. In this regard, we agree with Citizens.

The purpose of MCL 445.904 is not to define what constitutes a violation of the MCPA; it is to remove certain types of claims from the MCPA's purview. MCL 445.904 does so by explaining specific areas to which the MCPA does not apply. It is MCL 445.903 that defines "[u]nfair, unconscionable, or deceptive methods, acts, or practices" and makes such conduct unlawful under the MCPA in the first instance. In other words, MCL 445.903 broadly defines most of the conduct that is unlawful under the MCPA,[29] while MCL 445.904 removes certain subsets of this conduct from the MCPA's coverage. Thus, to determine whether Dell has stated a viable claim under the MCPA, the first question to be answered is whether the conduct she

[28] MCL 445.904(3)(b).

[29] Along with MCL 445.903, the MCPA contains other provisions that require or prohibit certain conduct. See MCL 445.903a through MCL 445.903i. None of these provisions are relevant to this matter.

alleges is unlawful under MCL 445.903; the second question is whether that conduct is exempted from the MCPA's purview by MCL 445.904.

Smith does not hold to the contrary. In *Smith*, the question whether the particular conduct at issue violated MCL 445.903(1) was not addressed. Rather, the question before the Court involved only the second part of the inquiry, i.e., whether the particular claim was exempted from the MCPA's purview by MCL 445.904.[30] Although the Court determined that the particular conduct at issue was not exempted from the MCPA by MCL 445.904, it was not asked to determine whether the conduct came within the MCPA's general purview as expressed by MCL 445.903.[31] *Smith* did not hold that MCL 445.904(2) created a cause of action for violations of Chapter 20 of the Insurance Code; it merely held that MCL 445.904 did not remove from the MCPA claims alleging conduct that violates Chapter 20 of the Insurance Code.

Nor does *Converse II* reach a different conclusion. In its order, our Supreme Court stated, "[b]ecause plaintiff brought this action within one year of the last payment, plaintiff's action was timely filed and thus plaintiff can seek to recover damages *resulting from the methods, acts or practices violative of the MCPA* based on conduct by defendant occurring from July 29, 1992, to March 28, 2001 . . . ." (Emphasis added.)[32] Thus, as was the case in *Smith*, our Supreme Court did not conclude that a violation of Chapter 20 of the

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[30] See *Smith*, 460 Mich at 462 (describing the issue as "whether [the insurer] *is exempted* from plaintiff's claim of MCPA violations") (emphasis added).

[31] Notably, however, the plaintiff in *Smith* did specifically allege several violations of MCL 445.903(1). See *Smith*, 460 Mich at 451 n 1.

[32] *Converse II*, 493 Mich at 878 (emphasis added).

Insurance Code was alone sufficient to state a claim under the MCPA. Rather, the plaintiff's allegations of unconscionable, unfair, or deceptive methods, acts, or practices were what was actionable.

Thus, we hold that the MCPA does not create a cause of action for violations of Chapter 20 of the Insurance Code. Rather, Dell must allege a violation of the MCPA itself to survive Citizens' motion for summary disposition under MCR 2.116(C)(8). Citizens argues that the conduct alleged in the complaint does not state a claim under the MCPA because, under its interpretation of MCL 445.903, the MCPA does not reach misconduct in the claims-handling and adjustment process. Citizens first relies on MCL 445.903(1), which provides that "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . . ." Citizens argues that the definition of "trade or commerce" does not encompass the claims-handling and adjustment process. We disagree.

MCL 445.902(1)(g) defines "trade or commerce" as

> the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

As may be seen, nothing in this definition explicitly discusses insurers, or more specifically, the claims-handling and adjusting process. But "[b]ecause the MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce, it must be liberally construed to achieve its intended goals."[33] Undoubt-

[33] *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993).

edly, at least as it pertains to conduct that occurred before March 28, 2001, the MCPA applies to insurance companies generally.[34] And as MCL 445.902(1)(g) makes clear, "trade or commerce" is much broader than simply advertising, marketing, or selling a product. It includes "the conduct of a business providing [a product or service]."[35] An insurance company "provides" the very product or service it is in the business of delivering—insurance coverage—through the claims-handling and adjustment process. Such conduct fits within MCL 445.902(1)(g)'s definition of "trade or commerce."

Most of the specific types of conduct that are unlawful under the MCPA are stated in the various subsections of MCL 445.903(1). Dell's complaint alleged that Citizens violated several of these subsections. The trial court concluded that at a minimum, Dell's complaint stated a claim under MCL 445.903(1)(n). Under this subsection, it is an unlawful method, act, or practice to "caus[e] a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction."[36] Dell alleged that Citizens misrepresented Dell's legal right to certain benefits under the insurance policy. She also alleged that Citizens misrepresented its own legal obligations under the policy. Such misrepresentations would create a "probability of confusion or of misunderstanding as to" Dell's legal rights and Citizens' obligations under the policy. According to MCL 445.903(1)(n), these allegations stated a claim under the MCPA.

Citizens argues that this Court should interpret MCL 445.903(1)(n) as not encompassing misconduct

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[34] MCL 445.904(3). See also *Converse II*, 493 Mich at 878.

[35] MCL 445.902(1)(g).

[36] MCL 445.903(1)(n).

that occurs in the claims-handling and adjustment process. We find nothing in the plain language of MCL 445.903(1)(n) to support such a limitation. Citizens first argues that because the majority of the specific types of conduct defined by MCL 445.903(1) as unfair, unconscionable, or deceptive methods, acts, or practices relate to advertising, marketing, or sales, all of the provisions should be interpreted as encompassing only advertising, marketing, or sales conduct. It is true that many of the subsections of MCL 445.903(1) refer to conduct that occurs in advertising, marketing, or sales.[37] However, not every subsection is so limited. In *Zine v Chrysler Corp*, this Court explained, with regard to MCL 445.903(1)(n), that "[b]ecause representations made both before and after the transaction has been completed could cause a party to the transaction to misunderstand the party's legal rights, [MCL 445.903(1)(n)] can reasonably be understood to refer to acts that occur before *and after* the transaction has been concluded."[38] That is precisely the situation alleged in Dell's complaint. Dell alleged that Citizens misrepresented its own obligations and Dell's rights created as a result of a transaction between the parties, i.e., the sale of the insurance policy. That the misrepresentations occurred after the sale was completed or in the context of handling a claim made under the policy is irrelevant.

[37] See, e.g., MCL 445.903(1)(d) ("Representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand"); (1)(e) ("Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"); (1)(g) ("Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented"); (1)(h) ("Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services").

[38] *Zine v Chrysler Corp*, 236 Mich App 261, 281; 600 NW2d 384 (1999).

Citizens also focuses on the term "transaction" in MCL 445.903(1)(n). Citizens argues that the "transaction" in this instance is the sale of the policy, and that "to be actionable under the MCPA, the conduct manifestly must relate to the sales transaction." Even accepting, arguendo, Citizens' basic premise, i.e., that the misconduct must relate to the sale of the insurance policy, Dell stated a claim under the MCPA. Citizens was a party to the sale of the insurance policy. The transaction created a legal obligation on the part of Citizens to pay certain benefits in the event of a covered accident. Dell's complaint alleged that Citizens misrepresented its obligations. Again, that these misrepresentations occurred after the sale was completed is irrelevant.[39]

In sum, while a claim of a violation of Chapter 20 of the Insurance Code alone is insufficient to state a claim under the MCPA, when the allegation also constitutes a violation of the MCPA, the claim may proceed if the conduct at issue occurred prior to March 28, 2001, and the complaint was filed on or before June 5, 2014. Dell's complaint met these requirements, and accordingly, Citizens' motion for summary disposition was properly denied.

III. JNOV

Dell argues that the trial court erred when it granted JNOV for a number of reasons. Because we conclude that Citizens waived the statute of limitations defense on which the trial court relied, we agree that the trial court erred.[40]

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[39] *Id*.

[40] We note that while Dell argued that the statute of limitations had been waived in response to the motion for JNOV, the trial court did not address or decide the question. Generally, an issue must be raised,

A. STANDARD OF REVIEW

"We review a trial court's decision with regard to a motion for JNOV de novo."[41] "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand."[42] "The interpretation and application of the court rules, like the interpretation of statutes, is a question of law that is reviewed de novo on appeal."[43]

B. DISCUSSION

"[T]he running of the statute of limitations is an affirmative defense."[44] Under MCR 2.111(F)(3), "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." However, "a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later

addressed, and decided in the trial court to be preserved for review. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). But Dell "should not be punished for the omission of the trial court." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). This Court may address the issue because it concerns a legal question and all of the facts necessary for its resolution are present. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 157 n 6; 742 NW2d 409 (2007).

[41] *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000).

[42] *Id*. at 260-261 (citation omitted).

[43] *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

[44] *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).

filed[.]"[45] Thus, a statute of limitations defense "must be raised in the responsive pleading, unless [it] previously [was] raised in a motion for summary disposition before the filing of a responsive pleading."[46] "The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense."[47]

The trial court's decision to grant JNOV was based entirely on the statute of limitations found in MCL 445.911(7). This statute provides that a claim under the MCPA must be brought within six years of "the occurrence of the method, act, or practice" that violates the MCPA, or within one year after the last payment in a transaction involving the method, act, or practice.[48] In its answer to Dell's amended complaint, Citizens did not mention MCL 445.911(7) as an affirmative defense. At best, Citizens stated, "[e]ven if Plaintiff states a claim of action under the [MCPA], her recovery is limited to losses within one year prior to filing the complaint." This statement did not establish that Citizens intended to defend against Dell's MCPA claim by asserting that the claim was barred by MCL 445.911(7). Rather, it demonstrated that Citizens contemplated that the claim might go forward, but that Dell's damages would be limited to those incurred no more than a year before she filed her complaint.[49]

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[45] MCR 2.111(F)(2)(a).

[46] *Stanke*, 200 Mich App at 312.

[47] *Id*. See also MCR 2.111(F)(2) ("A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted.").

[48] MCL 445.911(7).

[49] While not explicitly stated, this statement seems directly aimed at the one-year-back rule of MCL 500.3145(1).

Nor did Citizens raise the defense in a motion for summary disposition filed before it filed its answer. Citizens did file a motion for summary disposition prior to filing its amended answer. However, this motion argued that under MCL 500.3145(1), Dell's MCPA claim was limited to damages incurred in the year before filing the complaint. It did not argue that Dell's claim was barred by MCL 445.911(7). Quite the contrary, Citizens argued that the one-year-back rule of MCL 500.3145(1) trumped MCL 445.911(7) to the extent that the two were in conflict.[50]

Citizens argues that by raising the one-year limitation in its first responsive pleading and summary disposition motion, it should be deemed to have raised MCL 445.911(7) as an affirmative defense. Citizens relies on this Court's opinion in *Jesperson v Auto Club Ins Ass'n*[51] as support. In *Jesperson*, the plaintiff, in an amended complaint, raised a claim alleging that the defendant insurer failed to pay first-party no-fault benefits.[52] In its answer to the amended complaint, the insurer raised MCL 500.3145(1) as an affirmative defense.[53] However, and much the same as occurred here, the insurer only referred to the one-year-back provision of the statute; it "did not assert an affirma-

[50] Specifically, Citizens stated: "Moreover, to the extent that there is a conflict between [MCL 500.3145(1)] . . . and MCL 445.911(7) . . . , in the context of this case, [MCL 500.3145(1)] is the more specific of the two and therefore controls." It is true that the trial court, in its opinion deciding the motion, discussed MCL 445.911(7) and opined that the time period stated in this statute had not expired. However, neither party had raised MCL 445.911(7) in the context of the motion. That the trial court raised and considered the statute sua sponte does not demonstrate that Citizens raised the defense.

[51] *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632; 858 NW2d 105 (2014), lv gtd 497 Mich 987 (2015).

[52] *Id.* at 636.

[53] *Id.*

tive defense that specifically referred to the separate statute of limitations provision that is also reflected in MCL 500.3145(1)."[54] The insurer later filed a motion for summary disposition, arguing that the plaintiff's first-party claim was barred by the statute of limitations stated in MCL 500.3145(1).[55] The plaintiff argued that this defense had been waived because it was not raised in the insurer's answer to plaintiff's amended complaint.[56] Without addressing the waiver issue, the trial court ruled that the statutory period of limitations had run, and for that reason, granted summary disposition in favor of the defendant.[57]

This Court stated that the plaintiff had only specifically cited the one-year-back provision of MCL 500.3145(1) in its answer, but that by citing MCL 500.3145(1), the plaintiff "arguably was made aware of the limitations period of that statute and [was] not unfairly surprised by defendant's assertion of the defense."[58] But it was also true "that defendant did not refer to the statute of limitations in any fashion, and instead specifically described its affirmative defense as relating to the one-year-back provision of the statute, thereby arguably suggesting that it was not citing the statute for any other purpose."[59] However, this Court did not decide whether reference to the one-year-back provision of MCL 500.3145(1) was sufficient to avoid waiver of the statute of limitations found in the same statute. Rather, this Court explained that "leave to amend pleadings should be freely granted," and thus,

[54] *Id*.

[55] *Id*. at 637.

[56] *Id*. at 638.

[57] *Id*. at 638-639.

[58] *Id*. at 647.

[59] *Id*.

"had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading . . . ."[60] This Court saw "no need to remand the case for the trial court to do just that."[61] For this reason, this Court concluded that the "defendant did not waive the affirmative defense of the statute of limitations."[62]

Jesperson does not support Citizens' argument in this case. First, the *Jesperson* Court did not decide that raising the one-year-back provision was sufficient to raise a statute of limitations defense. The Court ultimately resolved the question on an alternate ground, specifically, that the defense could have been added by an amended answer, as is explicitly allowed by the court rules. Second, even if this Court's opinion could be read as holding that raising the one-year-back rule was sufficient to also raise the statute of limitations, it would only apply to the statute of limitations provision stated in MCL 500.3145(1). The question in *Jesperson* was whether citing a specific portion of MCL 500.3145(1) was sufficient to raise the entire statute as an affirmative defense. In this case, Citizens' motion for JNOV relied on MCL 445.911(7)—an entirely different statute with no similar one-year-back provision. Citizens' assertion of a one-year limitation on damages could not have even "arguably . . . made [Dell] aware of the limitations period of [MCL 445.911(7)]."[63] Accordingly, *Jesperson* does not support Citizens' position.

Citizens also argues that it adequately preserved its statute of limitations defense by raising it in its response to Dell's motion to amend her complaint. How-

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

ever, Citizens offers no authority, and we have found none, holding that an affirmative defense is adequately preserved by raising it in a response to a motion for leave to amend the complaint. Rather, our court rules and caselaw are clear. "Under MCR 2.111(F)(3), affirmative defenses must be raised in the responsive pleading, unless they previously have been raised in a motion for summary disposition before the filing of a responsive pleading, MCR 2.111(F)(2)(a)."[64] Clearly, Citizens' response to the motion to amend was not a responsive pleading.[65] Nor was the response a "motion

[64] *Stanke*, 200 Mich App at 312. This Court's application of the rule has been strict. In *Grzesick v Cepela*, 237 Mich App 554, 559-563; 603 NW2d 809 (1999), the trial court determined that the defendant had waived the affirmative defense of comparative negligence because, although the defense had been raised in the defendant's answer to the plaintiff's complaint, as well as in the defendant's answer to the plaintiff's first amended complaint, the defendant failed to plead the defense when responding to the plaintiff's second amended complaint. This Court agreed, explaining:

> [J]ust as an amended complaint supersedes the original complaint, a party's most recent amended answer supersedes any previously filed responsive pleadings. *Consequently, in order to be properly preserved, an affirmative defense must be expressly asserted, or expressly incorporated from a former pleading, in each successive amendment of the original responsive pleading.* In this case, in light of defendant's failure to explicitly reassert the affirmative defense of comparative negligence in her answer to plaintiff's second amended countercomplaint, the trial court properly ruled that defendant waived the defense. [*Id*. at 562-563 (emphasis added).]

Thus, even in circumstances where an affirmative defense had been raised in a previous responsive pleading, this Court has found that the failure to raise the defense precisely as required under the court rules results in waiver.

[65] See MCR 2.110(A) (defining a "pleading" as a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to a complaint, cross-claim, counterclaim, or third-party complaint, or a reply to an answer).

filed pursuant to MCR 2.116 . . . ."[66] Accordingly, Citizens waived the statute of limitations found in MCL 445.911(7).

Because Citizens waived the affirmative defense in MCL 445.911(7), the trial court erred by granting JNOV on that basis. The trial court's order must be reversed, and the matter remanded for entry of a judgment in accordance with the jury's verdict.

IV. REMAINING ISSUES

Dell raises a number of other arguments regarding the JNOV decision. Having concluded that the statute of limitations defense was waived, we need not address these arguments. Dell also raises issues related to other decisions made by the trial court during the proceeding. She asks us to consider these issues in the event the jury's verdict is not reinstated. Having concluded that the verdict must be reinstated, we need not address these remaining issues. However, one issue remains. Relying on its decision to grant the motion for JNOV, the trial court declined to consider Dell's motion for costs and attorney fees. On remand, we direct the trial court to decide Dell's motion.

The trial court's decision with regard to Citizens' motion for summary disposition is affirmed. We reverse the trial court's entry of JNOV. We remand the matter for reinstatement of the jury's verdict and further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING and GADOLA, JJ., concurred with TALBOT, C.J.

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[66] MCR 2.111(F)(2)(a).

PEOPLE v RAISBECK

Docket No. 321722. Submitted October 14, 2015, at Grand Rapids. Decided October 20, 2015, at 9:15 a.m. Leave to appeal denied 499 Mich 871 (2016).

Tonya Lynn Raisbeck was charged in the Allegan Circuit Court with one count of racketeering for five incidents of false pretenses involving a total of 18 victims. Defendant operated Mobile Modification, Inc., a business that promised, for a fee, to obtain mortgage modifications for its customers. There was no evidence that a single mortgage modification had been successfully completed. Defendant was convicted by jury, and the court, Kevin W. Cronin, J., sentenced her to 3 to 20 years of imprisonment with credit for 1 day served. The court also ordered defendant to pay a total of $23,052.86 in restitution to 31 identified victims of the racketeering scheme; some of the victims were not included in the felony information charging defendant with racketeering. Defendant appealed.

The Court of Appeals *held*:

1. There was sufficient evidence for the jury to find defendant guilty of racketeering. Defendant argued that the predicate felonies for racketeering must have occurred on different dates, but the statutory language does not support her argument. A single judgment of sentence reflecting the predicate felonies can form the basis of a racketeering conviction even though the precise date of each offense does not appear on the judgment of sentence. All that the governing statute requires with regard to timing is that the offenses occurred within a ten-year period of time.

2. The trial court properly refused to credit defendant's racketeering sentence with time she spent in jail for two of the predicate convictions on which defendant's racketeering conviction was based. A defendant is entitled to credit against a term of imprisonment for time spent in jail because of being denied or unable to furnish bond for the offense of which he or she was convicted. That is, defendant was not entitled to credit for the 360 days she spent in jail as the penalty for her previous false

pretenses violations, because defendant was being sentenced for her racketeering conviction and the time served was for her false pretenses convictions.

3. The trial court improperly ordered restitution for individuals who were not listed in the information on which defendant's prosecution was based. Restitution is limited to victims of the defendant's course of conduct that gives rise to the conviction. In this case, the trial court relied on caselaw that was later reversed to order that defendant pay restitution to more victims than were listed on the information. Restitution cannot be ordered for uncharged conduct. Because the victims were not listed on the information, their damages did not arise from the offense charged in the information.

4. The trial court properly aggregated the victims' losses to reach the monetary threshold for a felony charge of racketeering. The language in the false pretenses statute expressly states that the amount of money involved in separate incidents may be aggregated to reach the felony threshold, as long as the incidents occur within a 12-month period of time. In this case, the aggregate of the restitution amounts for victims listed in the information exceeded the felony threshold of $1,000.

Judgment of sentence vacated with regard to restitution only, remanded for entry of a revised restitution order, and affirmed in all other respects.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Matthew K. Payok* and *M. Elizabeth Lippitt*, Assistant Attorneys General, for the people.

Tonya Lynn Raisbeck, *in propria persona*.

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

TALBOT, C.J. Tonya Lynn Raisbeck appeals as of right her conviction and sentence, after a jury trial, of conducting or participating in the affairs of an enterprise directly or indirectly through a pattern of racketeering activity (racketeering).[1] We affirm Raisbeck's

[1] MCL 750.159i(1).

conviction, but vacate the judgment of sentence with respect to restitution only, and remand for further proceedings.

In the summer of 2010, Special Agent John C. Mulvaney headed an investigation into Mobile Modification, Inc. (MMI), a business incorporated by Raisbeck in 2008. MMI operated from a location in Fennville. For a fee, MMI promised to obtain mortgage modifications for its customers. Mulvaney's investigation began after several complaints were received that MMI would collect its fees, but provide nothing to its customers. On July 27, 2010, Raisbeck was arrested on misdemeanor charges and presented with a search warrant for the premises on which the business operated. Raisbeck allowed agents to search the premises. Through this search, agents discovered 195 customer files. After reviewing these files, it did not appear that a single modification had been successfully completed.

Raisbeck was initially prosecuted in Allegan County in case numbers 10-017019-FH and 10-017020-FH. These cases concerned six victims. Ultimately, Raisbeck was convicted of two counts of false pretenses more than $1,000 but less than $20,000.[2] She was also convicted of one count of conspiracy to commit false pretenses.[3] While preparing for this first trial, Mul-

[2] MCL 750.218(4)(a).

[3] MMI was separately charged and convicted in lower court case numbers 10-017015-FH and 10-017014-FH. Appeals were filed in all four cases, and the appeals were consolidated. *People v Raisbeck*, unpublished order of the Court of Appeals, entered March 14, 2012 (Docket Nos. 308569, 308581, 308601, and 308665). On December 28, 2012, this Court dismissed MMI's appeals because corporations may not pursue an appeal without an attorney, and no attorney had filed an appearance on MMI's behalf. *People v Mobile Modification, Inc*, unpublished order of the Court of Appeals, entered December 28, 2012 (Docket Nos. 308569 and 308665). On February 20, 2013, this Court dismissed both appeals arising from Raisbeck's convictions because Raisbeck had

vaney became aware of additional victims of MMI. After these initial cases concluded, Special Agent Pete Ackerly took over the investigation. Ackerly identified several additional victims. In January 2012, Raisbeck was charged with racketeering in case number 12-017853-FH, the case from which the instant appeal arises. On September 6, 2013, after a lengthy trial, a jury convicted Raisbeck of one count of racketeering. Through a special verdict form, the jury concluded that Raisbeck defrauded nine individual victims of a total of $7,752.[4]

I. SUFFICIENCY OF THE EVIDENCE

Raisbeck first argues that the evidence presented at trial was insufficient to support her racketeering conviction. We disagree. "A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt."[5]

As this Court has explained:

> [I]n order to find defendant guilty of racketeering, the jury needed to find beyond a reasonable doubt that: (1) an enterprise existed, (2) defendant was employed by or associated with the enterprise, (3) defendant knowingly conducted or participated, directly or indirectly, in the affairs of the enterprise, (4) through a pattern of racketeering activity that consisted of the commission of at

yet to file an appellate brief. *People v Raisbeck*, unpublished order of the Court of Appeals, entered February 20, 2013 (Docket Nos. 308581 and 308601).

[4] Specifically, the jury found that Raisbeck defrauded three victims of $994 each, and six victims of $795 each. The jury found that Raisbeck had not defrauded three additional victims.

[5] *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014).

> least two racketeering offenses that (a) had the same or substantially similar purpose, result, participant, victim, or method of commission, or were otherwise interrelated by distinguishing characteristics and are not isolated acts, (b) amounted to or posed a threat of continued criminal activity, and (c) were committed for financial gain.[6]

Raisbeck challenges whether there was sufficient evidence to demonstrate that she engaged in a pattern of racketeering activity. As is provided by statute:

> (c) "Pattern of racketeering activity" means not less than 2 incidents of racketeering to which all of the following characteristics apply:
>
> (*i*) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.
>
> (*ii*) The incidents amount to or pose a threat of continued criminal activity.
>
> (*iii*) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity.[7]

To establish a pattern of racketeering activity, the prosecutor relied, in part, on Raisbeck's previous false pretenses convictions. Raisbeck argues that because the prosecutor only presented a single judgment of sentence, which did not establish the precise dates on which she committed the previous offenses, the prosecutor failed to establish the third statutory element of racketeering. The essence of her argument is that to

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[6] *People v Martin*, 271 Mich App 280, 321; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

[7] MCL 750.159f(c).

satisfy this element, the crimes must have been committed on separate dates, and without evidence of these specific dates, her conviction cannot stand. Raisbeck is incorrect. Nothing in the statutory definition of a "pattern of racketeering activity" requires that the predicate criminal acts forming the basis of a racketeering conviction occur on different dates. The statute simply requires that the last criminal act occur within ten years of the previous criminal act, excluding the time during which a defendant is imprisoned.[8] The criminal acts at issue in this case all occurred within a period of less than ten years. Moreover, even excluding her previous false pretenses convictions, Raisbeck's racketeering conviction would be supported by the jury's conclusion that she defrauded nine additional victims.[9] Raisbeck's argument lacks merit.

Raisbeck also argues that the prosecutor did not present sufficient evidence to establish that she engaged in "racketeering" as that term is defined. "Racketeering" is defined, in relevant part, as committing or conspiring to commit "[a] felony violation of [MCL 750.218], concerning false pretenses."[10] Raisbeck argues that because no single transaction exceeded the $1,000 threshold stated in MCL 750.218(4)(a), there exists no evidence that she committed a felony violation of MCL 750.218. She argues that a prosecutor cannot aggregate separate incidents to satisfy the monetary threshold of MCL 750.218(4)(a). Raisbeck is incorrect. To satisfy the monetary threshold stated in MCL 750.218(4)(a), a prosecutor may aggregate separate, but related, incidents that occur within any

[8] MCL 750.159f(c)(*iii*).

[9] The prosecutor aggregated these victims into three violations of MCL 750.218(4)(a) (false pretenses).

[10] MCL 750.159g(w).

twelve-month period.[11] The prosecutor did so, aggregating 18 separate acts into five violations of MCL 750.218(4)(a). Raisbeck does not dispute that the separate incidents occurred within a period of twelve months, or that, as aggregated, those violations satisfied the $1,000 threshold.[12] Accordingly, Raisbeck's argument lacks merit.

II. SENTENCE CREDIT

Raisbeck next argues that the trial court erred by refusing to credit time served in jail against her racketeering sentence. We disagree. "The question whether defendant is entitled to sentence credit pursuant to MCL 769.11b for time served in jail before sentencing is an issue of law that we review de novo."[13]

Raisbeck served 360 days in jail for her prior false pretenses convictions. While she was in jail, the prosecutor charged Raisbeck with racketeering, the charge that resulted in the conviction at issue in this appeal. As she did in the trial court, Raisbeck argues that she was entitled to a credit of 360 days against her sentence

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[11] As is provided by Michigan's false pretenses statute, "The values of land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value involved in the violation of this section." MCL 750.218(8).

[12] Regardless, we note that the record reflects that the individual incidents occurred in a period of nine months, from June 2008 to February 2009. The record also demonstrates that, through a special verdict form, the jury concluded that Raisbeck committed no less than three violations of MCL 750.218(4)(a). These violations do not include Raisbeck's previous convictions of false pretenses, which also formed part of the basis for her racketeering conviction.

[13] *People v Waclawski*, 286 Mich App 634, 688; 780 NW2d 321 (2009).

for racketeering because the false pretenses convictions formed, in part, the basis for her racketeering conviction.

A criminal defendant's entitlement to credit for time served in jail is provided by MCL 769.11b:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.[14]

As our Supreme Court has explained:

> [MCL 769.11b] has been interpreted many different ways in the Court of Appeals, depending upon the factual permutations that result in presentence confinement in particular cases. The sheer number and the factual uniqueness of the host of cases that have been decided in the Court of Appeals defy discrete categorization, or restatement of simple majority and minority rules.
>
> It has been accurately observed, however, that interpretations of the statute in the Court of Appeals have fallen into one of three general categories: the *liberal* approach that ordinarily affords credit for any presentence confinement served for whatever the reason, and whether related or unrelated to the crime for which the sentence in issue is imposed; the *middle or intermediate* approach that asks the question whether the reason for the presentence confinement bears an "intimate and substantial relationship" to the offense for which the defendant was convicted and is seeking sentence credit; and the *strict* approach which limits credit to presentence confinement that results from the defendant's financial inability or unwillingness to post bond for the offense for which he has been convicted. Presumably, this last category would

[14] MCL 769.11b.

> include instances in which the accused is denied bail under the provisions of art 1, § 15 of the Michigan Constitution.
>
> The foregoing classifications are necessarily inexact, and some cases will present factual scenarios that do not fit precisely within any of the stated categories.[15]

Raisbeck's argument relies on cases generally taking the intermediate approach.[16] However, our Supreme Court resolved the apparent conflict among these approaches by holding that "[t]o be entitled to sentence credit for presentence time served, a defendant must have been incarcerated 'for the offense of which he is convicted.' "[17] Our Supreme Court has since reiterated that "credit is to be granted for presentence time served in jail only where such time is served as a result of the defendant being denied or unable to furnish bond 'for the offense of which he is convicted.' "[18] In other words, our Supreme Court has repudiated the intermediate approach relied on by Raisbeck. The time Raisbeck spent in jail was time served on her previous false pretenses convictions, not time served for the offense of which she was convicted in this case. Accordingly, Raisbeck was not entitled to sentence credit.

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[15] *People v Prieskorn*, 424 Mich 327, 333-334; 381 NW2d 646 (1985) (citations omitted).

[16] *People v Tilliard*, 98 Mich App 17; 296 NW2d 180 (1980); *People v Face*, 88 Mich App 435; 276 NW2d 916 (1979); *People v Groeneveld*, 54 Mich App 424; 221 NW2d 254 (1974). We note that none of these opinions are binding on this Court because each was decided before November 1, 1990. MCR 7.215(J)(1); *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

[17] *Prieskorn*, 424 Mich at 344, quoting MCL 769.11b.

[18] *People v Adkins*, 433 Mich 732, 742; 449 NW2d 400 (1989). See also *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009), quoting MCL 769.11b (stating that when a defendant "is incarcerated not 'because of being denied or unable to furnish bond' for the new offense, but for an independent reason," MCL 769.11b does not apply).

III. RESTITUTION

Finally, Raisbeck argues that the trial court erred by ordering her to pay more than $23,000 in restitution. We agree that the trial court erred in this regard. "This Court generally reviews an order of restitution for an abuse of discretion."[19] "But when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo as a question of law."[20]

On September 3, 2013, the ninth day of trial, the trial court and the parties discussed an amended information that had been filed by the prosecutor a few days earlier. After the trial court reviewed the amended information, it stated that there were "a total of 14 victims in this case." The prosecutor corrected the trial court, stating that "there's a total of 18 victims . . . as part of this." The trial court requested that the prosecutor amend the information to specifically name each individual victim. The following day, September 4, 2013, the prosecutor filed a revised amended information. This amended information included a single count of racketeering and alleged five separate felony violations of the false pretenses statute.[21] Each of these five violations involved three to four victims, and each victim was identified by name.

After the trial concluded, but before sentencing, the prosecutor filed a motion seeking restitution for 85 victims of Raisbeck's scheme. As is stated in the prosecutor's brief accompanying the motion, "the majority [of these victims] were not represented in the charges." The prosecutor relied on our Supreme Court's opinion in *People v Gahan*, which held that a

[19] *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009).

[20] *Id*.

[21] MCL 750.218.

sentencing court was permitted to order restitution to all victims, "even if those specific losses were not the factual predicate for the conviction."[22] Raisbeck responded to the motion by arguing that only those victims who formed the factual predicate for her conviction could be included in a restitution award. She further argued that several of the victims who formed the basis for her racketeering conviction had been compensated through restitution awards connected to her previous false pretenses convictions. In reply, the prosecutor asserted that he would seek restitution for approximately 30 victims beyond those who formed the basis for Raisbeck's racketeering conviction, as well as for five of the victims that did form part of the basis of the racketeering conviction.[23] Relying on *Gahan*, the trial court agreed that it could order restitution to be paid to all victims of Raisbeck's scheme. At sentencing, the trial court considered documentary evidence detailing the claims of these victims, and found that 31 claims for restitution were substantiated. The trial court awarded a total of approximately $23,000 in restitution.

After Raisbeck was sentenced, our Supreme Court decided *People v McKinley*.[24] In *McKinley*, our Supreme Court explicitly overruled its decision in *Gahan*:

> We conclude that the *Gahan* Court's reading of MCL 780.766(2) is not sustainable and must be overruled. The plain language of the statute authorizes the assessment of full restitution only for "any victim of the defendant's course of conduct *that gives rise to the conviction* . . . ." The statute does not define "gives rise to," but a lay dictionary

[22] *People v Gahan*, 456 Mich 264, 270; 571 NW2d 503 (1997), overruled by *People v McKinley*, 496 Mich 410; 852 NW2d 770 (2014).

[23] The jury determined that one of these five victims was not defrauded by Raisbeck. The trial court did not order restitution with regard to this victim.

[24] *McKinley*, 496 Mich 410.

> defines the term as "to produce or cause." *Random House Webster's College Dictionary* (2000), p. 1139. Only crimes for which a defendant is charged "cause" or "give rise to" the conviction. Thus, the statute ties "the defendant's course of conduct" to the convicted offenses and requires a causal link between them. It follows directly from this premise that any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant. Stated differently, while conduct for which a defendant is criminally charged and convicted is necessarily part of the "course of conduct that gives rise to the conviction," the opposite is also true; conduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction. Similarly, the statute requires that "any victim" be a victim "of" the defendant's course of conduct giving rise to the conviction, indicating that a victim for whom restitution is assessed need also have a connection to the course of conduct that gives rise to the conviction. Allowing restitution to be assessed for uncharged conduct reads the phrase "that gives rise to the conviction" out of the statute by permitting restitution awards for "any victim of the defendant's course of conduct" without any qualification.[25]

Thus, in *McKinley*, our Supreme Court concluded:

> Because MCL 780.766(2) does not authorize the assessment of restitution based on uncharged conduct, the trial court erred by ordering the defendant to pay $94,431 in restitution to the victims of air conditioner thefts attributed to the defendant by his accomplice but not charged by the prosecution. We therefore vacate that portion of the defendant's judgment of sentence.[26]

As held by our Supreme Court in *McKinley*, trial courts may not "impose restitution based solely on

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[25] *Id*. at 419-420.

[26] *Id*. at 421.

uncharged conduct."[27] Here, the information lists a single count of racketeering, "consisting of two or more of the following incidents . . . [.]" The information then lists five separate violations of the false pretenses statute. Each of these five violations involves various named victims, 18 in all. Thus, Raisbeck was charged with racketeering on the basis of her conduct with respect to the 18 individuals named in the information. The trial court, however, ordered restitution based on the claims of more than 20 victims who were not named in the amended information. Because these victims were not named in the amended information, any illegal conduct with respect to these victims was not charged. And because a trial court cannot order restitution for losses related to uncharged conduct, the trial court erred by ordering restitution for those individuals who were not named in the information.

The prosecutor argues that the language of MCL 750.159i(l), as well as the definition of a "pattern of racketeering activity" stated in MCL 750.159f(c), support a conclusion that all victims of Raisbeck's potential scheme were included in the single racketeering charge. Based on this premise, the prosecutor argues that the rule of *McKinley* was not violated because anyone defrauded by Raisbeck's scheme was necessarily included in the charge. Notably, this position is precisely contrary to the prosecutor's position in the trial court. There, the prosecutor stated that the majority of the victims for whom he sought restitution "were not represented in the charges." Regardless, we do not read the statutory provisions cited by the prosecutor as having any relevance to the proper scope of restitution.

The statutory provisions cited by the prosecutor (1) state that a racketeering charge requires the existence

[27] *Id*. at 424.

of a pattern of racketeering activity,[28] and (2) define the phrase "pattern of racketeering activity."[29] A "pattern of racketeering activity" requires a showing of "not less than 2 incidents of racketeering . . . ."[30] The term "racketeering" is defined as "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain," involving any one of a number of enumerated violations.[31] Thus, these provisions provide that a single racketeering charge is predicated on several individual incidents that form a pattern of racketeering activity. These provisions do not, however, necessarily expand the charge beyond the specific incidents that form its factual predicate. In this case, the amended information specifically names 18 individuals. Raisbeck's acts against these individuals form the factual predicate for the single racketeering charge. The prosecutor simply did *not* charge Raisbeck with committing a crime against any and all victims of her scheme; he charged her with committing a single crime against 18 named individuals.

The prosecutor also argues that as a policy matter, this Court should allow the trial court's order to stand because to do otherwise would contravene the purpose of the racketeering statute. Our Supreme Court "has recognized that the Legislature is the superior institution for creating the public policy of this state[.]"[32] With

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[28] MCL 750.159i(1).

[29] MCL 750.159f(c). We note that the prosecutor attempts to redefine the phrase "pattern of racketeering activity" by citing to a dictionary definition of "pattern." When our Legislature has defined a term, that definition controls, and it is unnecessary to turn to a dictionary. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013).

[30] MCL 750.159f(c).

[31] MCL 750.159g.

[32] *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010).

regard to restitution in felony cases, our Legislature has announced its policy decision through MCL 780.766. Our Supreme Court interpreted the statute in *McKinley* and made clear that the statute "does not authorize the assessment of restitution based on uncharged conduct . . . ."[33] The prosecutor cites no statute demonstrating that the Legislature has expressed the intent to treat restitution with regard to a racketeering conviction differently than a conviction for any other crime. We decline the invitation to make a public policy decision that differs from that expressed by our Legislature.

McKinley requires that we vacate that portion of the trial court's judgment of sentence that awarded restitution based on uncharged conduct.[34] Raisbeck must pay restitution only with regard to those victims named in the information. The trial court awarded $4,424.36 in restitution with regard to these victims.[35] Accordingly, we remand with instructions that the trial court enter an order assessing $4,424.36 in restitution against Raisbeck.

The judgment of sentence is vacated with respect to restitution, and the matter remanded for entry of an order assessing $4,424.36 in restitution. Affirmed in all other respects. We do not retain jurisdiction.

BECKERING and GADOLA, JJ., concurred with TALBOT, C.J.

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[33] *McKinley*, 496 Mich at 421.

[34] See *id*. at 424.

[35] At the sentencing hearing, the trial court ordered restitution in the amount of $4,225.36 with respect to the claims of individuals named in the information. The trial court later granted the prosecutor's motion to order additional restitution in the amount of $199. This additional amount was likewise based on the claim of an individual named in the information, and accordingly, the trial court properly imposed this additional amount.

HAYES v PAROLE BOARD

Docket No. 321547. Submitted October 13, 2015, at Lansing. Decided October 20, 2015, at 9:20 a.m.

In January 1996, Nathan Hayes was convicted in the Kalamazoo Circuit Court of armed robbery, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony. The court, William G. Schma, J., sentenced Hayes as a habitual offender to serve concurrent terms of 20 to 30 years in prison for his armed robbery and conspiracy convictions, which were to be served consecutively to a two-year term for his felony-firearm conviction. The calendar minimum date for Hayes's release is July 5, 2017, but his net minimum date for release (the calendar minimum date minus Hayes's disciplinary credits) was October 2, 2013. As early as 2008, Hayes began asking the Parole Board to consider him for parole, but the board repeatedly denied his requests. Hayes then asked Kalamazoo Circuit Court Judge Gary C. Giguere, Jr. (who was Judge Schma's successor) to grant the board jurisdiction to consider him for parole. Judge Giguere concluded that he did not have the authority to grant jurisdiction because the board is automatically vested with it. Finally, Hayes brought an action against the board in the Ingham Circuit Court, seeking a writ of mandamus directing the board to consider him for parole. The board argued that Hayes was not eligible for parole under MCL 769.12(4)(a), that it did not have a clear legal duty to consider Hayes for parole, and that Hayes's proper avenue for relief was to appeal Judge Giguere's opinion and order. Hayes, however, argued that the board had to consider him for parole after his net minimum date without the need for approval from his sentencing judge because it is only after parole consideration has been given that the board must obtain judicial approval. The Ingham Circuit Court, Rosemarie E. Aquilina, J., denied Hayes's request for a writ of mandamus and dismissed his complaint. Hayes appealed.

The Court of Appeals *held*:

1. To obtain a writ of mandamus, the plaintiff must demonstrate that (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has

a clear legal duty to perform that act, and (3) the act is ministerial, involving no exercise of discretion or judgment. A clear legal right is one clearly founded in or granted by law. It is a right that is inferable as a matter of law from uncontroverted facts, regardless of the difficulty of the legal question to be decided.

2. Hayes was entitled to a writ of mandamus. Under MCL 769.12(4)(a), a habitual offender who is not a prisoner subject to disciplinary time is generally not eligible for parole until the expiration of the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law. MCL 791.234(1) provides that the Parole Board acquires jurisdiction over such a prisoner when he or she has served time equal to the minimum sentence imposed by the court less good time and disciplinary credits, if applicable. MCL 791.235(1) requires that not less than one month before the expiration of the prisoner's minimum sentence less applicable good time and disciplinary credits, at least one member of the board must interview a prisoner before rejecting his or her parole. Accordingly, while MCL 769.12(4)(a) provides that Hayes will not be eligible for parole until the proper judge gives written approval, that fact by itself does not establish that the Parole Board has no obligation to consider Hayes as a possible candidate for parole. MCL 769.12(4)(a) requires written approval from the sentencing judge or that judge's successor before a prisoner otherwise selected for parole becomes eligible for the actual grant of parole, but it does not require written approval before the prisoner can even be considered for conditional release. Hayes became subject to the Parole Board's jurisdiction after he had served time equal to the minimum sentence imposed by the court less good time and disciplinary credits. No judicial approval was required. Consequently, at that point the board had a duty to consider whether he was a proper candidate for parole. At the very least, he was entitled under MCL 791.235(1) and (2) to an interview before the board unless the board concluded that he had a low probability of being paroled. Additionally, MCL 791.235(7) required the board to create a parole eligibility report for him. Neither event happened even though Hayes's net minimum date had passed. Under MCL 791.234 and MCL 791.235, the Board had to consider Hayes for parole before the expiration of his net minimum sentence. This right in conjunction with the board's clear duty rendered mandamus proper. Once parole consideration is complete, if the board decides that parole is proper, then it must obtain the successor judge's approval before granting parole.

3. While the Parole Board argued that mandamus was improper because Hayes could have appealed Judge Giguere's opinion and order concerning the board's jurisdiction, the judge's analysis was correct. Therefore, had Hayes appealed that decision, he would have been asking the Court of Appeals to affirm Judge Giguere's decision and then go a step further and order the board, which was not involved in that action, to consider Hayes for parole. That appeal would have been improper.

Reversed and remanded.

Levine & Levine (by *Sarissa K. Montague*) for Nathan Hayes.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Scott R. Rothermel*, Assistant Attorney General, for the Parole Board.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. In this dispute over the right to be considered for parole, petitioner, Nathan Hayes, appeals by right the trial court's opinion and order denying his complaint for a writ of mandamus compelling respondent, the Parole Board (the Board), to consider him for parole. Because we conclude that Hayes established grounds for mandamus, we reverse and remand.

I. BASIC FACTS

In January 1996, a jury found Hayes guilty of armed robbery, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony. The trial court sentenced Hayes as a habitual offender to serve concurrent terms of 20 to 30 years in prison for his armed robbery and conspiracy convictions, which were to be served consecutively to a two-year term for his felony-firearm conviction.

The "calendar minimum date" for Hayes's release is July 5, 2017. However, his "net minimum date"—his

calendar minimum date less disciplinary credits—for release was October 2, 2013. There is no dispute about whether Hayes has earned his disciplinary credits or concerning his net minimum date for release.

As early as 2008, Hayes began asking the Board to consider him for parole, but the Board repeatedly denied his requests. Hayes then asked Kalamazoo Circuit Court Judge Gary C. Giguere, Jr., who is the successor to Hayes's sentencing judge, to grant the Board jurisdiction to consider him for parole. Judge Giguere concluded that he did not have the authority to grant jurisdiction because the Board is automatically vested with jurisdiction. Notably, the Board was not involved in those proceedings.

Hayes then sued for a writ of mandamus. Specifically, he asked the trial court to order the Board to consider him for parole. The Board argued that mandamus was improper. It asserted that Hayes was not eligible for parole under MCL 769.12, that it did not have a clear legal duty to consider Hayes for parole, and that Hayes's proper avenue for relief was to appeal Judge Giguere's opinion and order. Hayes ultimately argued that the Board must consider him for parole after his net minimum date without the need for approval from his sentencing judge because it is only once that consideration has been made that the Board must obtain judicial approval. The trial court denied Hayes's request for a writ of mandamus and dismissed his complaint.

Hayes now appeals in this Court.

II. MANDAMUS

A. STANDARDS OF REVIEW

On appeal, Hayes argues that the trial court erred when it determined that he had not established the

right to a writ of mandamus compelling the Board to comply with its statutory duty to consider him for parole. This Court reviews for an abuse of discretion the trial court's decision on a request for a writ of mandamus, but reviews de novo the proper interpretation and application of the underlying law. *Younkin v Zimmer*, 497 Mich 7, 9; 857 NW2d 244 (2014).

B. ANALYSIS

"A writ of mandamus is an extraordinary remedy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519; 810 NW2d 95 (2011). In order to obtain a writ of mandamus, the plaintiff must demonstrate that "(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act and (3) the act is ministerial, involving no exercise of discretion or judgment." *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998). "[A] clear legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518-519; 866 NW2d 817 (2014) (quotation marks and citation omitted).

When construing a statute, this Court's "purpose is to discern and give effect to the Legislature's intent." *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). We begin with the text, and, if the language is unambiguous, we "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*. at 330.

Further, "courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). We will, however, review the statute in context to produce—if at all possible—a harmonious and consistent construction of the whole statutory scheme. *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014). "Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013).

Under MCL 769.12(4)(a), a habitual offender who is not a prisoner subject to disciplinary time[1] is generally "not eligible for parole until" the expiration of the "minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law." MCL 791.234(1) provides that the Parole Board acquires jurisdiction over "a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility" when that "prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable." Under MCL 791.235(1), the Board has an obligation to interview a

[1] Because defendant committed his crimes before December 15, 1998, he is not a "prisoner subject to disciplinary time," MCL 791.33c; MCL 800.34(5)(a), for whom different rules and time limits apply. The statutes and the quotations from them throughout this opinion are those applicable to prisoners who are not prisoners subject to disciplinary time.

prisoner before rejecting his or her parole: "[A] prisoner shall not be denied parole without an interview before 1 member of the parole board. The interview shall be conducted at least 1 month before the expiration of the prisoner's minimum sentence less applicable good time and disciplinary credits . . . ." Additionally, under MCL 791.235(7), "[a]t least 90 days before the expiration of the prisoner's minimum sentence less applicable good time and disciplinary credits . . . , a parole eligibility report shall be prepared by appropriate institutional staff."

The Board claims that it has no obligation to review Hayes's request for parole because he is "not eligible for parole" under MCL 769.12(4)(a) until his sentencing judge or the judge's successor provides written approval. While it is true that MCL 769.12(4)(a) provides that Hayes will not be eligible for parole until the proper judge gives written approval, that by itself does not establish that the Board has no obligation to consider Hayes as a possible candidate for parole. The grant of parole generally means the grant of permission to leave confinement with certain restrictions. See *People v Armisted*, 295 Mich App 32, 38-39; 811 NW2d 47 (2011). The Board reads MCL 769.12(4)(a) as setting forth the necessary requirements for a prisoner to become eligible *to be considered* for release on parole; however, nothing in MCL 769.12(4)(a), or any other statute for that matter, requires written approval from the sentencing judge or his or her successor for a prisoner *to be considered* for release on parole. MCL 769.12(4)(a) requires written approval before a prisoner otherwise selected for parole will become eligible for the actual grant of parole. It does not require, as the Board suggests, written approval before a prisoner can even be considered for conditional release.

To adopt the Board's understanding would require us to ignore the unambiguous provisions of MCL 791.234 and MCL 791.235. Under MCL 791.234(1), Hayes became "subject to the jurisdiction of the parole board when [he had] served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits[.]" No judicial approval was required. Consequently, at that point, the Board had a duty to consider whether he was a proper candidate for parole. At the very least, he was entitled to "an interview before 1 member of the parole board" unless the Board concluded that he had "a low probability of being paroled." MCL 791.235(1) and (2). Additionally, he was entitled to have, and the Board was required to create, "a parole eligibility report." MCL 791.235(7). That did not happen despite the fact that Hayes's net minimum date has passed.

Under MCL 791.234 and MCL 791.235, the Board had to consider Hayes for parole before the expiration of his net minimum sentence. It is Hayes's right in conjunction with the Board's clear duty that renders mandamus proper. "Mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Vorva*, 230 Mich App at 655-656. Once that consideration is complete, if the Board decides that parole is proper, then it must obtain the successor judge's approval before granting parole, as required under MCL 769.12(4)(a). Accordingly, Hayes is entitled to a writ of mandamus.

C. OTHER ISSUES

The Board claims that this appeal should be dismissed under MCL 600.5507, but that statute applies

to civil actions concerning prison conditions, and MCL 600.5531(a) expressly excludes "proceedings challenging the fact or duration of confinement in prison, or parole appeals or major misconduct appeals" from that category.

The Board also warns that resolution of this issue in Hayes's favor could cause "a waste of valuable Parole Board resources to process a prisoner through the lengthy pre-parole process only to have the sentencing or successor judge deny it with a quick order." This argument fails to acknowledge that the Board's preferred construction would involve a similar use of resources, albeit by the trial courts rather than the Board. Under the Board's interpretation, trial courts would be the point of first contact for all prisoners who are nearing (or even think they are nearing) their net minimum sentence. The courts would have to investigate the requests, determine which prisoners are indeed nearing their net minimum sentence, and then make a decision, without the benefit of a parole report, about whether granting parole is appropriate. Then, after expending valuable judicial time on the request, the Board could—as with the trial court—simply deny the request with a quick decision. Accordingly, this argument is not a valid basis for refusing to grant Hayes's request for relief.

The Board additionally contends that, because the relationship between MCL 791.234 and MCL 769.12 is ambiguous, there cannot be a "clear legal duty" on the part of the Board. MCL 791.234 and MCL 769.12 are not, however, ambiguous. A clear legal duty, like a clear legal right, is one that "is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners*, 308 Mich App 518-519 (quotation marks and citation

omitted). There is a clear legal duty on the part of the Board to consider Hayes for parole, and that duty cannot be disregarded because of the complex nature of the legal question involved.

Lastly, the Board argues that mandamus is improper because Hayes could have appealed Judge Giguere's opinion and order concerning the Board's jurisdiction. Judge Giguere's analysis was correct. Accordingly, had Hayes appealed that decision, he would have been asking this Court to affirm the decision and then go a step further and order the Board, which was not involved in that action, to consider him for parole. Such an appeal would have been improper. Mandamus relief is appropriate here because the Board improperly refused to consider a prisoner for parole upon the expiration of his net minimum sentence. See *Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 566; 396 NW2d 482 (1986).

III. CONCLUSION

Hayes was entitled to mandamus relief. We therefore reverse the trial court's opinion and order and remand this matter to the trial court to issue a writ of mandamus.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ., concurred.